

121 FERC ¶ 61,224
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Amaranth Advisors L.L.C.
Amaranth LLC
Amaranth Management Limited Partnership
Amaranth International Limited
Amaranth Partners LLC
Amaranth Capital Partners LLC
Amaranth Group Inc.
Amaranth Advisors (Calgary) ULC
Brian Hunter
Matthew Donohoe

Docket No. IN07-26-001

ORDER DENYING REHEARING

(Issued November 30, 2007)

1. This order addresses whether the Commission has authority under section 4A of the Natural Gas Act (NGA) to sanction manipulative trading of natural gas futures contracts when it finds that such manipulative trading had a nexus to and significant effect on the prices of Commission jurisdictional wholesale sales of natural gas. On July 26, 2007, the Commission issued an Order to Show Cause (OSC) to the above ten Respondents, directing them to show why they had not violated section 4A of the NGA and section 1c.1 of the Commission's regulations, 18 C.F.R. §1c.1 (2006) (Anti-Manipulation Rule) as well as to show cause why they should not be assessed civil penalties and be required to disgorge unjust profits, plus interest. On August 27, 2007, four of the ten Respondents, Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, and Amaranth Group (collectively "Amaranth") filed a request for expedited rehearing of the OSC (Rehearing Request). Amaranth seeks to terminate the OSC proceeding because it claims that the Commission lacks subject matter jurisdiction over Amaranth's alleged manipulation. As discussed

below, the Commission denies Amaranth's rehearing request.¹ Some of the other six Respondents also filed requests for rehearing of the OSC but their rehearing requests are not addressed in this order. They will be addressed in a future order.²

I. Background

A. The Order to Show Cause

2. In the OSC, the Commission preliminarily concluded that Amaranth's trading in Natural Gas Futures Contracts (NG Futures Contracts) had a direct and substantial effect on the price of Commission-jurisdictional transactions, affecting natural gas customers and ratepayers across the United States, both of which the Commission is required by statute to protect.³

3. Amaranth traded in NG Futures Contracts⁴ on the New York Mercantile Exchange (NYMEX). Trading NG Futures Contracts creates a "settlement price," which is the volume-weighted average price of trades made during the last 30 minutes of trading (typically from 2:00 p.m. to 2:30 p.m.) on the third-to-last business day of the month preceding the next calendar month. The Commission detailed in the OSC preliminary findings that Amaranth appears to have manipulated (in this case driving down) the

¹ On October 12, 2007, the Commission extended the date for responses to the OSC to fourteen days after the Commission's ruling on Amaranth's Request for Rehearing. Pursuant to that Notice, Respondents shall now answer the OSC, as specified in P 140(a) and (b) of the OSC, not later than 14 days from the issuance of this Order.

² We are disposing of Amaranth's rehearing request in its entirety. We will address issues raised in rehearing requests by other Respondents, such as the authority to assess civil penalties, the construction of the term "any entity" as to individuals, or the liability of such Respondents, in a future order.

³ See generally *Order to Show Cause*, 120 FERC ¶ 61,085 (July 26, 2007) (OSC).

⁴ NG Futures Contracts are standardized contracts that specify the terms under which a buyer will accept and a seller will deliver a specified quantity of natural gas at a specified place and over a specified month in the future. Typically, NG Futures Contracts provide for the future delivery of 10,000 MMBtus of natural gas over the course of the contract month to the buyer's interconnection on the Henry Hub in Louisiana. See Natural Gas Futures Contracts, NYMEX Exchange Rulebook §§ 220.05, 220.10-12, http://www.nymex.com/rule_main.aspx?pg=33#220.05 (last visited Sept. 14, 2007).

settlement price of NG Futures Contracts by selling an extraordinary amount of NG Futures Contracts during the last 30 minutes of trading before the contracts expired.⁵ Considered in isolation, Amaranth's trading could be economically irrational because it made less on the sales of these contracts. However, because Amaranth took positions several times *larger* in various financial derivatives whose value *increased* as a direct result of the decrease in the settlement price of NG Futures Contracts, Amaranth could have gained on its overall financial positions.

4. The Commission also explained that NG Futures Contracts are not purely financial instruments because some futures contracts traders take their contracts "to delivery," meaning they hold the contracts into the month during which the contract becomes a contract for actual purchase and delivery of 10,000 MMBtus' of natural gas at the Henry Hub delivery point in Erath, Louisiana.⁶ The price of that *physical* natural gas transaction is the NG Futures Contracts settlement price. In addition, "physical basis" transactions are based on the NG Futures Contracts settlement price.⁷ The NG Futures Contracts settlement price is directly incorporated into many published price "indices," which are relied upon by physical buyers and sellers as a benchmark to determine the prevailing price for natural gas at a given location, or a specified differential to a published price index in the event the gas is to be delivered at a different location.⁸ Therefore, the Commission explained, Amaranth's actions, if proven to have driven down the NG Futures Contracts settlement price, had a direct and substantial effect on the price of several different types of *physical* natural gas transactions – transactions that are indisputably within the Commission's jurisdiction.⁹

5. If the NG Futures Contracts settlement price was driven down by Amaranth's trading, sellers who went to delivery on short NG Futures Contracts, as well as producers

⁵ OSC at PP 84, 91 and 106.

⁶ *Id.* at PP 5, 26.

⁷ *Id.* at P 20.

⁸ *Id.* at PP 21-24. To compile monthly "indices" of those prices at various physical natural gas trading locations, publishers of natural gas industry newsletters (*e.g.*, Platts or NGI) conduct price surveys of market participants. Those surveys capture a significant amount of the aforementioned physical basis transactions. *See generally Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121, *clarification granted*, 105 FERC ¶ 61,282 (2003).

⁹ OSC at PP 20-27, 108-10.

and other natural gas market participants, may have been paid an artificially lower price for their natural gas. Such manipulation undermines confidence in and integrity of energy markets that are critical to supporting an adequate natural gas infrastructure and that provide consumers reasonable prices for natural gas. Finally, the pecuniary interests of state and federal governments may have been harmed when natural gas from public lands was sold for royalties that are also tied to the NYMEX settlement price.

6. The Commission preliminarily concluded in the OSC that Amaranth and the other Respondents violated the Commission's Anti-Manipulation Rule, which was adopted pursuant to section 4A of the NGA, 15 U.S.C. § 717, as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 315 (2005) (codified at 15 U.S.C. 717c-1) (EPAAct 2005). It proposes that Amaranth pay civil penalties and disgorge unjust profits under similarly new enhanced penalty provisions also added to the NGA by EPAAct 2005.¹⁰ It also ordered responses to the OSC's specific allegations. Amaranth sought leave, and it and all other Respondents have been permitted, to file responses to the OSC within fourteen days after this ruling.

B. Amaranth's Request for Expedited Rehearing on the Issue of the Commission's Jurisdiction

7. Amaranth's rehearing request generally raises the issue of the Commission's subject matter jurisdiction to proceed with its OSC under section 4A of the NGA. New section 4A was added to the NGA, along with a parallel provision which was added to the Federal Power Act (FPA), by EPAAct 2005. It provides as follows:

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 . . . 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. (emphasis added).

8. In support of its Rehearing Request, Amaranth raises three principal points of error. First, Amaranth contends that section 4A of the NGA does not confer jurisdiction on the Commission to regulate trading of futures that takes place exclusively on the NYMEX because such transactions are within the "exclusive jurisdiction" of the

¹⁰ *Id.* at P 75.

Commodity Futures Trading Commission (CFTC).¹¹ Amaranth contends that the CFTC has exclusive jurisdiction to regulate manipulation within financial markets, even if such conduct directly and substantially impacts the Commission's jurisdictional natural gas markets. Amaranth maintains that the EAct 2005 amendments to the NGA did not expand the Commission's jurisdiction to include trading "solely" in natural gas futures that affects Commission-jurisdictional markets and that there is no jurisdictional overlap between the Commission and CFTC because the Commodity Exchange Act, P.L. 74-765, 49 Stat. 149 (1936) (CEA) grants the CFTC "exclusive jurisdiction . . . with respect to accounts, agreements and transactions involving contracts for the sale of a commodity for future delivery."¹² Amaranth cites legislative history from 1974 to support its claim that the Commission is preempted from regulating futures markets.¹³ In further support of this argument, Amaranth claims that the "savings clause" in section 23 of the NGA (a natural gas market transparency provision which was added to the NGA by EAct 2005), confirms that Congress did not expand the Commission's jurisdiction to include manipulation of futures contracts, but instead withheld regulatory power from the Commission by re-affirming the CFTC's exclusive jurisdiction under the CEA.¹⁴ According to Amaranth, decisions holding that two agencies may conduct separate investigations are inapplicable because the CFTC has exclusive jurisdiction over the claims at issue.¹⁵ Amaranth also contends that section 23 gave the Commission authority only to collect from market participants and disseminate information about the availability and prices of natural gas sold at wholesale in interstate commerce.¹⁶ According to Amaranth, the related requirement that the Commission enter into a Memorandum of Understanding (MOU) with the CFTC is intended to ensure only that information requests are coordinated, and not to authorize the Commission to take regulatory action.¹⁷

¹¹ Rehearing Request at 13-16.

¹² 7 U.S.C. § 2(a)(1)(A) (2000). *See generally* Rehearing Request at 16-25.

¹³ Rehearing Request at 15.

¹⁴ *Id.* at 16-21.

¹⁵ *Id.* at 24-25.

¹⁶ *Id.* at 17-18

¹⁷ *Id.* at 18-19.

9. Second, Amaranth argues that the Commission exceeded its jurisdictional bounds, principally because the “in connection with” language of section 4A of the NGA does not confer subject matter jurisdiction over the types of futures transactions addressed by the OSC.¹⁸ While the Commission stated in the OSC that EAct 2005 expanded its authority to police all forms of manipulation in connection with its jurisdictional markets, Amaranth contends that the “in connection with” language in section 4A of the NGA added by EAct 2005 did not confer upon the Commission jurisdiction to regulate so-called “non-jurisdictional” activity or entities even if the actions affect Commission-jurisdictional markets.¹⁹ Because Amaranth was not itself a party to the purchase or sale of physical natural gas contracts, Amaranth claims the manipulation alleged by the Commission was not “in connection” with Commission-jurisdictional transactions. Specifically, Amaranth maintains that, our statements in the OSC notwithstanding, section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b) (2000) (Securities Exchange Act) and cases applying that provision, do not guide the analysis of whether the NG Futures Contracts transactions were “in connection with” physical natural gas markets because the Commission was not given the enforcement powers provided in section 10(b).²⁰ According to Amaranth, Congress only meant to incorporate into section 4A the definitions of certain *terms* used in section 10(b). Alternatively, if statutory construction of the “in connection with” clause of section 10(b) is applicable to NGA section 4A, Amaranth contends that legal precedent supports its position that Amaranth would be subject to the Commission’s jurisdiction only if Amaranth traded in physical natural gas that “coincided with” or was “in furtherance” of the manipulative scheme.²¹ Because Amaranth claims it did not engage in such transactions, it asserts that the “in connection with” element is not satisfied.

10. Third, accepting its own interpretation of the EAct 2005 and the NGA, Amaranth argues that our Order No. 670 adopting the Anti-Manipulation Rule²² likewise stated that we do not regulate fraud and manipulation in “non-jurisdictional” transactions, such as

¹⁸ *Id.* at 26-39.

¹⁹ *Id.* at 26-31.

²⁰ *Id.* at 31-32.

²¹ *Id.* at 34-36.

²² *Prohibition of Energy Market Manipulation*, Order No. 670, 71 Fed. Reg. 4244 (January 26, 2006), FERC Stats. & Regs. ¶ 31,202 (codified at 15 U.S.C. 717c-1) (Order No. 670).

NG Futures Contracts.²³ Amaranth recites language from Order No. 670 which it claims is inconsistent with our preliminary conclusions in the OSC. From there, Amaranth contends the Commission's OSC is arbitrary, capricious, and an abuse of discretion because we failed to explain why we "departed" from our determination in Order No. 670.²⁴

II. Commission Determination

11. As the Supreme Court has held, the primary purpose of the NGA is to "protect consumers against exploitation."²⁵ The Commission is required by statute to ensure that certain physical sales of natural gas sales are just, reasonable and not unduly discriminatory or preferential under the NGA and that natural gas consumers are thereby protected.²⁶ Beginning in the 1980s, the Commission regulated jurisdictional wholesale sales of natural gas on a market basis and thus its responsibility to assure just and reasonable rates is fulfilled by ensuring that natural gas markets remain competitive. In the OSC we preliminarily determined that Amaranth's manipulative trading of NG Futures Contracts, which are not directly regulated by the Commission on a day-to-day basis, nevertheless had a direct effect on the price of natural gas sales which are within the Commission's jurisdiction.²⁷ Because of this direct effect on jurisdictional sales, the behavior fell within the NGA section 4A prohibition of direct or indirect manipulation in connection with jurisdictional sales. In making our preliminary findings in the OSC, we took into account the CFTC's exclusive jurisdiction to oversee the operation of the futures markets.²⁸ The Commission neither asserted jurisdiction over day-to-day regulation of CFTC-regulated futures contracts transactions nor sought to interfere with that jurisdiction. Rather, as we stated in the OSC, the Commission's jurisdiction over activities that affect its markets is complementary to the CFTC's jurisdiction over the activities that affect futures markets.²⁹

²³ Rehearing Request at 39-41.

²⁴ *Id.* at 41

²⁵ *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

²⁶ 15 U.S.C. § 717t-2(a)(1) (2000).

²⁷ OSC at PP 108-10.

²⁸ *Id.* at PP 48, 55.

²⁹ *Id.* at PP 48.

12. As discussed in detail below, the statutory language of NGA section 4A, in conjunction with Congress' recognition of the overlap in FERC and CFTC regulated markets in the NGA section 23 transparency provision that was enacted simultaneously by Congress, supports the Commission's interpretation. Further, the historical context in which Congress considered the NGA section 4A and parallel FPA section 222 amendments supports the interpretation that Congress intended the Commission to ensure that there is no regulatory gap in sanctioning manipulative behavior affecting jurisdictional gas and electric markets. The result of our interpretation is that although the Commission and the CFTC each have exclusive jurisdiction over the day-to-day regulation of their respective physical energy and financials markets, where, as here, there is manipulation in one market that directly or indirectly affects the other market, both agencies have an enforcement role. This is a dual role that was contemplated by Congress, that should be coordinated and consistent wherever possible, and that, in the end, will redound to the benefit of all market participants.

A. The Commission's NGA Section 4A Jurisdiction

13. Although presented as the second point in Amaranth's "specification of errors," the question of whether the Commission has jurisdiction, in light of the "in connection with" language of NGA section 4A, or otherwise, is the most fundamental issue presented (regardless of the CFTC's jurisdiction). Accordingly, we turn to that question first and, after resolving that question, we turn to Amaranth's other arguments, as necessary.

14. Before addressing Amaranth's jurisdictional arguments, we note four basic factual points that were contained in the OSC and are, at this point in the proceedings, undisputed by Amaranth:

- a. Amaranth does not dispute that the alleged manipulation in this case involves three interrelated markets: (1) the NG Futures Contracts market; (2) a variety of "derivative" financial products; and (3) Commission-jurisdictional wholesale natural gas sales, namely, wholesale natural gas sales in interstate commerce that are not "first sales" within the meaning of the Natural Gas Policy Act of 1978 (NGPA).³⁰ Amaranth does not dispute that the first market affects the second and third inasmuch as the NG Futures Contracts settlement price determines, in whole or in part, the value of the derivatives and the price of a substantial volume of Commission-jurisdictional wholesale natural gas sales.³¹

³⁰ 15 U.S.C. § 3431(a) (2000).

³¹ OSC at PP 2, 6, 108-10.

b. Amaranth does not dispute that the “settlement price” attaches to any NG Futures Contracts that becomes a contract for the sale of physical natural gas. During the months of interest in this matter, blanket certificate holders such as ConocoPhillips, BP, Louis Dreyfus, UBS, and Merrill Lynch each sold natural gas by holding more than 2,000 NG Futures Contracts through expiration in one or more of the months for approximately 20 billion cubic feet of physical gas that went to delivery.³² These physical natural gas sales were, in whole or in part, Commission-jurisdictional transactions. Amaranth presents no evidence or argument to the contrary.

c. Amaranth does not dispute that substantial volumes of bid week³³ transactions are “physical basis” transactions that are priced using the NG Futures Contracts settlement price and that such sales are largely Commission-jurisdictional.³⁴

d. Amaranth does not dispute that monthly indices at many trading centers are set primarily by physical basis transactions during “bid week” and thus also use the NG Futures Contracts settlement price as a reference price. Amaranth also does not dispute that, in turn such price indices are widely used in bilateral natural gas markets that are subject to the jurisdiction of the Commission.³⁵ Thus, as Amaranth agrees, the “public relies on the [NYMEX] settlement price” as a “key price benchmarked for physical . . . contracts involving natural gas.”³⁶ Nor does Amaranth dispute that state regulators sometimes look to index or settlement price-based purchases of natural gas by local distribution companies in evaluating whether such purchases were prudent.

³² *Id.* at P 25 (*citing* NYMEX open interest, trade, and delivery data, ferc_item13_ng_top_tdr_final2.xls).

³³ “Bid week” is the last five business days of the month. *See generally Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121, *clarification granted*, 105 FERC ¶ 61,282 (2003).

³⁴ OSC at P 22.

³⁵ *Id.* at 22-23, 25.

³⁶ Letter from Michael Carrieri, Compliance Director of Amaranth, to Anthony Densieski, Senior Director, Market Surveillance, NYMEX (Aug. 30, 2006).

1. The Commission's Preliminary Jurisdictional Findings and the Language and Purpose of the Anti-Manipulation Provisions

15. Although the rehearing request offers a number of detailed and specific legal points and authorities, Amaranth's central argument with respect to our jurisdiction is that the NGA and the Anti-Manipulation Rule do not confer jurisdiction on the Commission to prohibit the conduct alleged in the OSC.³⁷ As with any issue of statutory and regulatory construction, we begin with text and purpose of the statute (including pertinent legislative history), our rule implementing the statute, and our order adopting the rule. We then apply the legal interpretation to the facts at hand.

16. As noted above, section 315 of EPAct 2005 added a new section 4A to the NGA that provides in pertinent part:

It shall be unlawful for *any* entity, directly *or indirectly*, to use or employ, *in connection with* the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, *any* manipulative 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. (emphasis added).^[38]

17. This language, in particular the broad and general terms used therein, is most reasonably read to give the Commission broad authority to sanction manipulative conduct where, as here, such conduct has a nexus to and significantly affects jurisdictional sales. The language making it unlawful for "any entity" to engage in manipulative conduct in

³⁷ Rehearing Request at 10-12 (rejecting the OSC findings in PP 44-51 and 108-10).

³⁸ 15 U.S.C. § 717c (2005). With respect to the "subject to the jurisdiction of the Commission" element, section 1(b) of the NGA grants the Commission jurisdiction over "the sale in interstate commerce of natural gas for resale." 15 U.S.C. § 717(1)(a) (2000). The NGPA, 15 U.S.C. §§ 3301 *et seq.* (2000), and the Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989), exclude from the Commission's NGA jurisdiction all "first sales," 15 U.S.C. § 3431(a) (2000), which are all sales from the producer to the consumer, unless and until the gas is purchased by an interstate pipeline, intrastate pipeline, or local distribution company or an affiliate thereof. 15 U.S.C. § 3301(2)(21)(A) (2000). *See also Amendments to Blanket Sales Certificates*, Order No. 644, FERC Stats. & Regs. ¶ 31,153 at P 14 (2003), *reh'g denied*, 107 FERC ¶ 61,174 (2004).

connection with jurisdictional transactions demonstrates Congress' intent to capture not only natural gas companies or other jurisdictional companies historically subject to the NGA but rather any individual, corporation, or governmental or non-governmental entity that engages in the prohibited behavior. The language "directly or indirectly" is reasonably read to prohibit behavior not only by entities engaging in Commission jurisdictional transactions but entities engaging indirectly, for example through intermediaries, in such transactions, or in behavior indirectly affecting such transactions.³⁹ Similarly, the language "any manipulative device or contrivance" is reasonably read to capture a broad array of manipulative or deceptive conduct that may harm Commission jurisdictional markets and customers. The legislative history of the enactment of this new provision and the parallel provision in the FPA, section 222, supports a reasonably broad interpretation of the Commission's authority to sanction manipulative or deceptive conduct. While the Conference Report accompanying EAct 2005 does not contain discussion of the anti-manipulation provisions, there is ample discussion in floor debates leading up to EAct 2005 to demonstrate that Congress intended to confer on the Commission broad authority to prohibit manipulation affecting jurisdictional markets. In floor debates discussing the scope of manipulative practices to be prohibited, two different versions of the anti-manipulation provisions were introduced and considered in May 2005: the "Cantwell Amendment," which sought to add broad anti-manipulation language similar to that of section 10(b) of the Securities Exchange Act and a narrower "Domenici Amendment" that had a specific list of prohibited practices.⁴⁰ The broad Cantwell Amendment, modeled on section 10(b), became what is now section 4A of the NGA and section 4A expressly provides that terms common to section 10b and

³⁹ Cases interpreting section 10(b), which provides that it "shall be unlawful for any person, directly or indirectly," to use any instrumentality of interstate commerce in connection with a manipulative or deceptive device or contrivance, held that the "word 'indirectly' is quite broad and pervasive" and, therefore, use of a telephone to arrange a meeting for purposes of effectuating a fraud satisfies the requirements of section 10(b). *Nemitz v. Cunny*, 221 F. Supp. 571, 573 (N.D. Ill. 1963). Therefore, section 10(b) and Rule 10b-5 have been read to impose liability on any person who participated in a manipulative or deceptive scheme, even if a material misstatement by another person created the connection between the scheme and the securities market. *In re Lernout & Haupsie Sec. Lit.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003).

⁴⁰ See 151 Cong. Rec. S 7451 at 40 (daily ed. June 28, 2005) (Statement of Sen. Cantwell).

4A are used in the same manner in section 4A as in section 10(b). Congress then expressly delegated *to the Commission* the task of adopting rules to give life to section 4A.⁴¹

18. In commenting on the essentially identical electric anti-manipulation provision that was ultimately adopted alongside section 4A, Senator Jeff Bingaman, Ranking Member of the Senate Committee on Energy and Natural Resources when EPAct 2005 was enacted, stated that “we should give FERC this tool and make it clear in the law that all of these deceptive and manipulative practices are illegal. Once we make that clear, we are in a position to hold FERC accountable, if in fact, manipulation or deceptive practices occur in the future.”⁴²

19. It is reasonable to infer from this statement that, in the aftermath of the manipulative practices by Enron and other companies that were uncovered in connection with the Western energy crisis of 2000-2001, Congress intended to give the Commission the tools needed to sanction future manipulation affecting jurisdictional prices and services and to rely on the Commission’s expertise and knowledge of relevant markets to craft rules that would most fully effectuate the prevention, detection, and punishment of manipulation affecting Commission jurisdictional markets.

20. To implement section 315 of EPAct 2005 and NGA section 4A, the Commission promulgated its Anti-Manipulation Rule, section 1c.1 of the Commission’s rules, which prohibits:

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 [from using] or employ[ing] any device, scheme, or artifice to defraud, [or from engaging in] any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.^[43]

21. In adopting this rule, we issued Order No. 670 and expressly ruled the Anti-Manipulation Rule is an intentionally broad proscription against all kinds of deception, manipulation, deceit and fraud.⁴⁴ We clarified the following elements of a manipulation

⁴¹ See 15 U.S.C. §717(c) (2005) (the “Commission may prescribe as necessary [rules] in the public interest or for the protection of natural gas ratepayers.”).

⁴² 149 Cong Rec. S 10182 (daily ed. July 30, 2003) (statement of Sen. Bingaman).

⁴³ 18 C.F.R. § 1c.1 (2006).

⁴⁴ Order No. 670 at P 49.

claim: “an entity: (1) . . . engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite *scienter*; (3) in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission.”⁴⁵ Order No. 670 explained that fraud is defined generally to include “any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”⁴⁶

22. The Anti-Manipulation Rule applies whether or not the manipulator’s principal or exclusive purpose is the manipulation of physical natural gas sales. In Order No. 670, we stated “we do 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 Anti-Manipulation Rule.⁴⁷ Yet, such a transaction would be covered if “in committing fraud, the entity . . . intended to affect, or have acted recklessly to affect, a jurisdictional transaction.”⁴⁸ We pointed out that the “in connection with” language is drawn from similar language of Rule 10b-5, which has been very liberally construed.⁴⁹ Accordingly, we held in Order No. 670 and observed in the OSC that the Anti-Manipulation Rule applies where there is a “nexus” between the manipulative conduct and the jurisdictional transaction. Under the analogous Rule 10b-5 precedent, the alleged manipulator need not be a party to the jurisdictional transaction, nor must the connection be overwhelmingly direct.⁵⁰ Finally, we also explained that a determination of manipulation, in general, is “a question of fact that is to be determined by all the circumstances of a case.”⁵¹ We note that after significant commentary relating to our notice of proposed rulemaking as to the Anti-Manipulation Rule, there were no appellate challenges to our Final Rule.

⁴⁵ *Id.* at P 50.

⁴⁶ *Id.* (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)).

⁴⁷ *Id.* at P 22 (emphasis added).

⁴⁸ *Id.* (emphasis added).

⁴⁹ *Id.*

⁵⁰ As discussed below, the Anti-Manipulation Rule prohibits an entity from “directly or indirectly” committing fraud.

⁵¹ Order No. 670 at P 50.

23. Based on information developed to date, the Commission preliminarily concluded that Amaranth's manipulation of the NG Futures Contracts settlement price was "in connection with" Commission-jurisdictional transactions.⁵² First, the settlement price directly sets the price for any NG Futures contracts that ultimately went to delivery at Henry Hub. As noted, the contracts were substantial in number. This connection is certainly direct. Second, the settlement price is indirectly incorporated into the price for physical basis transactions. Finally, the price of a substantial proportion of physical basis transactions are used in indices, and those indices, in turn, price a substantial volume of physical natural gas. The OSC presented data supporting the conclusion that a significant proportion of these sales are jurisdictional to the Commission. As we noted in the OSC, millions of consumers, particularly on the East Coast, are affected by these prices. Some of these various types of connections are direct, others are indirect. They each vary in magnitude. As discussed below, all of them qualify Amaranth's conduct as "in connection with" Commission jurisdictional transactions.

2. The Language of NGA Section 4(a) as Compared to NGA Section 4A

24. Amaranth contends that the phrase "in connection with" in NGA section 4A should be interpreted identically to the same phrase that appears in NGA section 4(a)⁵³ (governing the Commission's ratemaking authority) because section 4A's anti-manipulation language "closely tracks" the section 4(a) ratemaking language.⁵⁴ In passing, we note that Amaranth's rehearing request makes several additional arguments about the "in connection with" language, including its relationship to other phrases in the Anti-Manipulation Rule, the breadth of the phrase under the securities laws, and the like. Thus, we are called upon to address it from several different perspectives throughout this order.⁵⁵ This particular argument rests on the fact that two sections of the NGA, 4A and 4(a), use the phrase "in connection with." Section 4(a) of the NGA provides that:

[a]ll rates and charges made, demanded, or received by any natural gas company for or in connection with the transportation or sale of natural gas subject to the

⁵² OSC P 108-10.

⁵³ Prior to and after EAct 2005, the NGA has a "section 4(a)." The new Anti-manipulation provision added by EAct 2005, which did not replace section 4(a), was denominated "section 4A."

⁵⁴ Rehearing Request at 36-31.

⁵⁵ See further discussion *infra* at paragraphs 34-45.

jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.^[56]

25. The language of section 4(a) provides the Commission with ratemaking authority over natural gas companies with respect to rates and charges “in connection with” the transportation or wholesale sales of natural gas within the Commission’s jurisdiction as defined (and limited) in section 1(b) of the NGA. However, use of the term “in connection with” is where the similarity of the two provisions begins and ends, and the fundamental flaw in Amaranth’s argument is that Congress expressly patterned section 4A, including the “in connection with” language therein, on section 10(b) of the Securities Exchange Act, *not* on section 4(a) of the NGA. No one challenged the Commission’s statement in Order No. 670 that it would interpret “in connection with” in a manner consistent with section 10(b). Thus it is reasonable to rely on section 10(b) precedent, and not section 4(a) precedent, to interpret the phrase “in connection with.” EAct 2005 does not increase the variety of transactions within the Commission’s ratemaking jurisdiction under pre-existing NGA section 4(a). We re-iterate here our findings in the OSC that such a jurisdictional transaction must be directly or indirectly affected by manipulative or deceptive conduct in order for the manipulation or deception to violate the Anti-Manipulation Rule.⁵⁷ However, Congress did broaden (with language in section 4A that is not present in section 4(a)) the conduct affecting such transactions that the Commission may police, namely manipulative or deceptive conduct by any entity that, either directly or indirectly, is in connection with the purchase or sale of natural gas or transportation services within the Commission’s jurisdiction. *See* further discussion *infra* at paragraphs 30-45 and 59.

26. The cases cited by Amaranth for the proposition that “identical words used in different parts of the same act are intended to have the same meaning”⁵⁸ did not involve a situation, as here, where Congress amended a statute with a new provision expressly modeled on a provision in another act.⁵⁹ The “in connection with” language used in

⁵⁶ 15 U.S.C. § 717c(a) (2005).

⁵⁷ OSC at P 110.

⁵⁸ Rehearing Request at 30.

⁵⁹ *See Env'tl. Def. v. Duke Energy Corp.*, 127 S.Ct. 1423, 1424 (2007) (the same statutory terms used in different parts of the statute may be construed differently in order to satisfy distinct statutory objectives); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (the meaning of statutory language depends on the context in which it is used).

section 4A must be read in the context of the entire section 4A provision. We believe that the differences in the language used in section 4(a) and in section 4A, taken in their entirety, reflect the broad remedial purpose of Congress in enacting section 4A. Thus, it is not only reasonable as a matter of statutory interpretation, but is consistent with congressional intent to interpret each provision (4(a) and 4A) based on the entirety of each provision as a whole. Furthermore, section 4A, which was modeled after the Securities Exchange Act provision, provides that terms common to section 10(b) and 4A (such as “to use or employ, in connection with” and “any manipulative or deceptive device or contrivance in contravention of such rules”) should be interpreted as those terms are used in section 10(b), not 4(a).

27. The section 4(a) cases cited by Amaranth supporting its restrictive interpretation of “in connection with” are inapposite. In *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) (*Conoco*), the court held that the phrase “in connection with” appearing in section 4(a) of the NGA did not allow the Commission to regulate gathering facilities because they are expressly exempt from the Commission’s jurisdiction in section 1(b) of the NGA, 15 U.S.C. § 717(b) (1994).⁶⁰ Similarly, in *Federal Power Comm’n v. Panhandle Eastern Pipe Line Co.*, the Supreme Court ruled that facilities, such as reserves and gas leases used for gas production and gathering, are likewise beyond the jurisdiction of the Commission because they too fall within section 1(b) exemptions.⁶¹ However, “the scope of the Commission’s power under the inclusive ‘in connection’ with’ language of §§ 4 and 5 [of the NGA] was not at issue.”⁶² Finally, *Williams Natural Gas Processing-Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004) (*Williams*) does not hold, as Amaranth contends, that a gathering affiliate is beyond the Commission’s jurisdiction if it does not directly participate in natural gas markets. Rather, the *Williams* holding concerns whether the Commission can disregard the corporate form and reassert jurisdiction over a gathering facility, which is expressly exempt from regulation under section 1(b) of the NGA, because its activities are interrelated to an affiliated interstate pipeline.⁶³

⁶⁰ *Conoco*, 90 F.3d at 552 (section 1(b) expressly exempts from the Commission’s jurisdiction the gathering of natural gas).

⁶¹ 337 U.S. 498, 504 (1949).

⁶² See *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1272 (8th Cir. 1991) (discussing the scope of the Supreme Court’s decision in *Federal Power Comm’n v. Panhandle Eastern Pipe Line Co.*).

⁶³ *Williams*, 373 F.3d at 1342-43.

28. These decisions simply concluded that section 4(a) could not be construed in a manner that would expand the jurisdiction expressly foreclosed in section 1(b). They did not address (nor could they, since section 4A had not been enacted) the broader scope of section 4A which expressly applies to “any entity” – not just natural gas companies – that “directly or indirectly” take certain actions in connection with the “purchase or sale” of jurisdictional services. In this case, the Commission’s construction of its jurisdiction under section 4A does not conflict with section 1(b) because that section does not exempt financial market participants, such as Amaranth, or trading in natural gas futures markets. Furthermore, the logic, if not the result, of the *Conoco* decision can be read to support the Commission’s view here that when non-jurisdictional transactions, such as natural gas futures contracts, affect jurisdictional markets, the “in connection with” requirement of section 4(a) would be met.⁶⁴ We find no relevance to the few cases cited by Amaranth⁶⁵ in which the courts have rejected jurisdictional assertions by the Commission in other contexts that are not present here, other than for the general proposition that the Commission cannot create jurisdiction that Congress has not conferred.⁶⁶

⁶⁴ The court in *Conoco* held that when exempt gathering facilities become “intertwined with jurisdictional activities, the Commission’s regulation of the latter may impinge on the former.” 90 F.3d at 549. Thus, “[a]s an abstract matter, [the court had] no reason to doubt the Commission’s conclusion that a nonjurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate pipeline to manipulate access and costs of gathering.” *Id.* The holding in *Conoco* simply rested on the section 1(b) exemption which trumped the section 4(a) language, a construct not relevant here.

⁶⁵ Rehearing Request at 36-39.

⁶⁶ Amaranth’s reliance on *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239 (D.C. Cir. 1996), *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005), *pet. for cert. pending*, No. 07-155 (filed Aug. 6, 2007); *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004), and *N. States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999) is misplaced. In each of these decisions, the courts concluded that the plain language of the statute clearly delineated FERC’s jurisdiction. *Altamont*, 92 F.3d 1239 (NGA expressly reserved to states the authority to determine the intrastate rate structures); *Bonneville*, 422 F.3d 908 at 917-19 (FPA expressly states that FERC’s jurisdiction extends to public utilities and that FERC’s refund authority does not extend to governmental entities); *California Indep. Sys. Operator*, 372 F.3d at 401 (FPA limited FERC’s authority over public utility boards); and *N. States Power Co.*, 176 F.3d at 1095 (federal regulation extends to matters not subject to state regulation and states have authority over retail rates and practices). In this case, the NGA expressly confers

(continued...)

29. Amaranth's proposed reading is also problematic because it essentially eliminates much of the intended effect of the new section 4A that was hard fought for and prevailed in Congress. Prior to 2005, the Commission had authority under section 4(a) to punish manipulation by sellers in physical natural gas markets and, therefore, had promulgated "Market Behavior Rules" prohibiting manipulation by such sellers.⁶⁷ Congress is not presumed to enact surplusage.⁶⁸ The better interpretation is that Congress meant to expand Commission authority beyond what existed in 2005 to proscribe the conduct alleged in the OSC. *See* further discussion of the "in connection with" language *infra* at paragraphs 34-45 and 59.

3. Whether the Anti-Manipulation Rule is Limited to "Physical Sellers" or "Sales" Transactions.

30. Amaranth's next specific argument is that the Commission is "bootstrapping"⁶⁹ language in the NGA's new section 4A into a new and broad jurisdictional grant that reaches beyond physical sellers and their sales transactions. This argument is without merit because it ignores the simple fact that new section 4A was, indeed, a new and broad jurisdictional grant by Congress to the Commission that goes beyond prior Commission jurisdiction to prohibit manipulation involving entities and transactions traditionally not regulated by the Commission.

31. As Amaranth concedes, Congress granted the Commission broad authority to police market manipulation by "any entity." The word "any" gives the word it modifies (in this case, "entity") an expansive meaning.⁷⁰ Thus, Amaranth's argument that the

jurisdiction upon FERC to prohibit market manipulation that is "in connection with" its jurisdictional markets. No other NGA provisions limit FERC's authority to prevent market manipulation.

⁶⁷ *See* 18 C.F.R. § 284.403(a) (2005).

⁶⁸ *City of Roseville v. Norton*, 348 F.3d 1020, 1028 (D.C. Cir. 2003) (*citing Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 698 (1995)).

⁶⁹ Rehearing Request at 36.

⁷⁰ *Norfolk S. Rwy. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004) (the word "any" gives the word it modifies an expansive reading); *Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 130-31 (2002); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (one must give effect to each word in a statute so that none is rendered superfluous); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("any" is an expansive term, meaning "one or some indiscriminately of whatever kind,"); *New York v. EPA*, 443 F.3d 880, 885-87

(continued...)

Commission has authority to assess civil penalties for manipulation only against a physical seller of natural gas is inconsistent with the language of the statute.⁷¹ First, section 4A and the Anti-Manipulation Rule prohibits any entity from “directly or indirectly” engaging in manipulation “in connection with” a jurisdictional transaction. Neither speaks in terms of conduct by an entity “engaged in” or “a party to” such transaction. Contrary to Amaranth’s sweeping assertion that the physical and financial markets are “completely separate,”⁷² the manipulation alleged here had a profound cross-market effect: on the futures contracts that went to physical delivery, on physical basis transactions, and on transactions based off indices calculated using physical basis transactions. “Increasingly, the price of natural gas in many supply contracts between suppliers and local distribution companies (“LDC”) . . . is determined based upon monthly price indexes closely tied to the monthly settlement of the NYMEX futures contract . . . without question a participant’s trading conduct in one venue can effect, and has affected, the price of natural gas contracts in the other.”⁷³ Second, Amaranth’s contention that section 23 of the NGA, which directs the Commission to promulgate rules that facilitate price transparency in natural gas markets, confirms that the Commission has civil penalty authority only against “sellers” of natural gas is based on a misreading of the statute. Section 23, which is separate and distinct from section 4A, allows the Commission to obtain information about the price and availability of natural gas from “any market participant,” not simply sellers.⁷⁴ Section 23(e) specifies that civil penalties for violating *this section* are limited to the three years before notice of the proposed penalty, except in cases where a seller engaged in fraudulent or manipulative activities in violation of section 4A that materially affected the sales contract.⁷⁵ This exception to a limitation on a subset of NGA violations implicated by section 23 does not override the

(D.C. Cir. 2006) (the word “any” is broadly construed to reflect Congress’ intent that all types of physical changes are subject to the Clean Air Act’s New Source Review program).

⁷¹ Rehearing Request at 20.

⁷² *Id.* at 26.

⁷³ Testimony of Laura Campbell, Assistant Manager of Energy Resources, Memphis Light, Gas & Water on behalf of APGA before the CFTC (Sept. 18, 2007).

⁷⁴ 15 U.S.C. § 717t-2(a)(3)(A).

⁷⁵ *Id.* at §§ 717t-2(e)(1) and (2).

broader language of section 4A.⁷⁶ In contrast, NGA section 22(a) specifies the Commission's civil penalty authority for violations of *the Act*, which includes violations of section 4A.⁷⁷

32. Consistent with the foregoing authorities, Order No. 670 provides that the statutory phrase “any entity” (which is repeated in the Rule) covers not only companies that have traditionally been subject to the Commission's jurisdiction (such as natural gas pipeline companies or public utilities), but also any company or firm, and natural persons⁷⁸ who, “intended to affect, or have acted recklessly to affect, a jurisdictional transaction.”⁷⁹ Amaranth's contention that only direct purchasers or sellers of physical natural gas are subject to the Commission's anti-manipulation jurisdiction not only is contradicted by the “any entity” language of section 4A, but is directly contradicted by the Supreme Court decision on which it relies. In *United States v. O'Hagan*, the Supreme Court stated that “as written, [section 10(b)] does not confine its coverage to deception of a purchaser or seller of securities; rather the statute reaches *any* deceptive device used “in connection with” the purchase or sale of a security.” (citation omitted) (emphasis added).⁸⁰ Other cases decided under the Securities Exchange Act generally demonstrate that one can violate Rule 10b-5 (which implements section 10(b)) without being a purchaser or seller of a security.⁸¹

33. Moreover, section 4A expressly prohibits any entity from “directly or *indirectly*” using a manipulative or deceptive device. The term “indirectly” supports the conclusion that Congress intended the NGA's anti-manipulation prohibition to apply to more than conduct *within* the Commission's traditionally regulated market and more than just the direct wholesale seller of the physical commodity. Amaranth's statutory interpretation

⁷⁶ *Id.*

⁷⁷ *Id.* at §§ 717t-1.

⁷⁸ Order No. 670 at PP 2, 18.

⁷⁹ *Id.* at P 22.

⁸⁰ *O'Hagan*, 521 U.S. 642, 658 (1997).

⁸¹ See, e.g., *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (permitting shareholder suit for damages under Rule 10b-5 where company made misleading statements that affected its own stock).

effectively reads the term “indirectly” out of the statute, thereby violating the basic rule of statutory construction to give meaning to all statutory terms.⁸²

4. The “In Connection With” Requirement

34. Amaranth contends most fundamentally that the Commission lacks jurisdiction over trades outside the physical natural gas markets because of the “in connection with” requirement in NGA section 4A.⁸³ We find that Amaranth reads the requirement too narrowly and in a manner that precludes the achievement of much of what Congress intended. Congress could have, but did not, prohibit manipulative or deceptive conduct that occurred *in* Commission-jurisdictional markets. Instead, Congress used expansive language that prohibits manipulative or deceptive practices by any entity, directly or indirectly, “in connection with” the purchase, sale or transportation of natural gas historically within the Commission’s jurisdiction. We discussed this phrase in the OSC⁸⁴ and we revisit it more fully here.

35. Because the clause “in connection with” is undefined, we begin with an examination of ordinary usage.⁸⁵ According to Fowler’s *Modern English Usage*, “in connection with” is noted for . . . its “pliability.”⁸⁶ Furthermore, “connection” is defined by Webster’s *Third New International Dictionary* 481 (1981) as a “relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement).”⁸⁷ Therefore, in a variety of contexts, courts have broadly and flexibly

⁸² *TRW Inc.*, 534 U.S. at 31 (each word in a statute must be given meaning).

⁸³ Rehearing Request at 26-39.

⁸⁴ OSC at PP 50, 110.

⁸⁵ *Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (statutory construction begins with the plain language of the statute and the assumption that the ordinary meaning of the language reflects the statutory purpose); *Bailey v. United States*, 516 U.S. 137, 144-45 (1995) (interpret undefined statutory terms by referring to the term’s ordinary usage).

⁸⁶ Fowler’s *Modern English Usage* 172 (R.W. Burchfield ed., 3d ed. 1996).

⁸⁷ *See also* *American Heritage Dictionary of the English Language* 400 (3d ed. 1992) (connection is an association or relationship).

interpreted the phrase “in connection with” to encompass a wide variety of relationships and always with an eye to accomplishing statutes’ broad remedial purposes.⁸⁸

36. In addition to considering the common definition of language used in the statute, we also evaluate (as we did in Order No. 670) how “in connection with” is used in section 10(b) of the Securities Exchange Act, on which section 4A was modeled.⁸⁹ Cases construing section 10(b) and Rule 10b-5, as well as legislative history of section 10(b), are therefore relevant to the Commission’s construction of section 4A. In its Rehearing Request, Amaranth claims that only the phrase “manipulative scheme or device” (and not the rest of NGA section 4A) are to be construed consistent with section 10(b).⁹⁰ While section 4A states that the phrase is to be so construed, a comparison of identical phrases used throughout section 4A and section 10(b) shows that Congress intended section 4A and the implementing rules to be modeled after section 10(b).

37. The “in connection with” language of section 10(b) has been construed expansively by the Supreme Court to accomplish the broad remedial purposes of section 10(b) which was enacted to restore the integrity of securities markets and promote investor confidence following the stock market crash of 1929.⁹¹ In *Zandford* and

⁸⁸ *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (*Zandford*) (“in connection with” should be read broadly and flexibly, not restrictively); *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 (1971); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996) (“in connection with” is interpreted expansively); *United States v. Thompson*, 32 F.3d 1, 6-7 (1st Cir. 1994) (same); *SEC v. Hopper*, No. 04-1054, 2006 U.S. Dist. LEXIS 17772 (S.D. Tex. Mar. 24, 2006) (“[a] plaintiff makes out a sufficient nexus with the purchase or sale of securities when the defendants’ deceptive conduct affects a market for securities.”) (quoting *In re Parmalat Sec. Lit.*, 376 F. Supp. 2d 472, 505-06 (S.D.N.Y. 2005)).

⁸⁹ 15 U.S.C. § 717c (2005) (terms are used in the same manner as section 10(b)).

⁹⁰ Rehearing Request at 31-32.

⁹¹ See *Zandford*, 535 U.S. at 819 (the “in connection with requirement” of the SEC regulatory scheme, on which the Anti-Manipulation Rule is modeled, should be interpreted flexibly, not technically and restrictively, to accomplish the statutes’ remedial purposes of promoting market integrity and investor confidence) (citing *United States v. O’Hagan*, 521 U.S. 642, 651 (1997)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006) (“the magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated”); *Bankers Life & Cas. Co.*, 404 U.S. at 10 (construction of section 10(b) extends beyond maintaining the integrity of securities markets).

Bankers Life & Cas. Co., the Supreme Court upheld the SEC's broad and flexible reading of the "in connection with" requirement of section 10(b) to accomplish the broad remedial purpose of the statute. Here we note the historical similarity of the posture of the Securities and Exchange Commission (SEC) in 1934 to our own situation with respect to the anti-manipulation provisions. In response to the Western energy crisis of 2000-2001, EAct 2005's parallel anti-manipulation provisions were added to both the FPA and NGA to ensure that the Commission had sufficient tools to address and punish manipulative behavior such as that engaged in by Enron during the crisis. Congress clearly did not want to limit the types of manipulation that might harm jurisdictional markets and thus provided broad, general language to allow the Commission to sanction unforeseen types of manipulation that could harm customers. As the SEC broadly construed the Securities Exchange Act in early enforcement actions to restore confidence in financial markets, we will similarly broadly construe the "in connection with" provision to effectuate the Congressional purpose of the anti-manipulation provisions enacted as part of EAct 2005.

38. In *Zandford*, the Supreme Court held that the "in connection with" requirement was met when deceptive acts, such as the misappropriation of proceeds from the purchase or sale of securities, coincided with the purchase or sale of securities, even though the transactions themselves are lawful.⁹² Similarly, *SEC v. Hopper* held that even though "round-trip" trading (which involves pre-arranged sham transactions designed to artificially increase trading volumes) may not have involved directly the purchase or sale of a security, "a plaintiff makes out a sufficient nexus with the purchase or sale of securities when the defendant's deceptive conduct affects a market for securities."⁹³ Thus, the court held that the alleged fraud which arose from statements about transactions, and not the transactions themselves, may satisfy the "in connection with"

⁹² *Zandford*, 535 U.S. at 819-20 (even though the stockbroker's actual sale of securities was lawful, section 10(b) extends to the stockbroker's scheme to defraud his clients). See also *Bankers Life & Cas. Co.*, 404 U.S. at 12-13 (the "in connection with" requirement is met when the deceptive act of misrepresenting who would receive the proceeds from the sale of bonds "touches" the purchase or sale of a security). See also *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (although a formal transaction in the securities market did not take place, section 10(b) applied to an oral contract for the sale of an option on a security, while the seller secretly intended to never allow the purchaser to exercise the option.).

⁹³ *SEC v. Hopper*, No. 04-1054, 2006 U.S. Dist LEXIS 17772 at *39 (S.D. Tex. Mar. 24, 2006) (quoting *In re Parmalat Sec. Lit.*, 376 F. Supp. 2d 472, 505-06 (S.D.N.Y. 2005)).

requirement if investors considered the energy company's false trading numbers in deciding whether to purchase or sell the company's securities.⁹⁴ Indeed, the entire line of section 10(b) "insider trading" cases where a "tipper" does not herself trade in securities but only the outsider "tippee" does so, are predicated on the notion that the section 10(b) violation need not be directly tied (either contractually or temporally) to the securities trading.⁹⁵

39. In its most recent pronouncement on the "in connection with" requirement, the Supreme Court again reaffirmed the breadth of the phrase. "[W]hen this Court *has* sought to give meaning to the phrase ["in connection with"] in the context of section 10(b) and Rule 10b-5, it has espoused a broad interpretation."⁹⁶ Importantly, the Court in *Shadi* also affirmed that this breadth is imported into other statutes where, as with NGA section 4A, Congress replicates section 10(b) language in those other statutes.⁹⁷ "Congress can hardly have been unaware of the broad construction adopted by both [the Supreme Court] and the SEC when it imported the key phrase - - 'in connection with the purchase or sale' into" other statutes.⁹⁸

40. Congress' intention to cover a wide range of conduct is further evidenced in the broad remedial purpose and legislative history of section 10(b), wherein the Congressional committee reporting on what became section 10(b) noted that deceptive practices "constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers" in the regulatory

⁹⁴ *Hopper* at *40-41.

⁹⁵ *E.g. SEC v. Rocklage*, 470 F.3d 1, 8-10 (1st Cir. 2006) (spouse of insider who passed on inside information to a third person, but did not herself trade securities, satisfied the "in connection with" requirement and was found to violate securities trading laws within the meaning of *Zandford* because she knew that the likely result of her tip would be to affect securities trading).

⁹⁶ *Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Shadi*, 547 U.S. 71, 85 (2006).

⁹⁷ *Id.* at 85-86.

⁹⁸ *Id.* at 85 (the court broadly construed the "in connection with" requirement contained in the Securities Litigation Uniform Standards Act of 1998).

agency “have been found practically essential.”⁹⁹ Similarly, as noted above, the 109th Congress favored the broad prohibitory language we have in the statute today.

41. Amaranth states that in the vast majority of securities cases, the conduct may directly involve the purchaser of a security.¹⁰⁰ But this, even if true, is because the SEC would ordinarily seek to punish fraud that is perpetrated against a specific investor by an offeror or seller. In such cases, the sale of a security will be present. The frequency of this fact pattern, however, does not amount to a legal requirement. Where, as here, the Commission is responsible for protecting wholesale markets and the customers that rely on those markets, we believe it is reasonable to interpret section 4A in a way that does not permit market manipulation abuses that, as here, have a direct link to jurisdictional prices of gas, to go unremedied by the Commission.

42. There are multiple decisions holding that the “in connection with” requirement is met under fact patterns similar to those presented in the OSC. The Supreme Court defined market manipulation under Rule 10b-5 as conduct “*controlling or artificially affecting the price of securities*”¹⁰¹ or practices that “*artificially affect market activity.*”¹⁰² Courts have sustained Rule 10b-5 claims when misrepresentations and omissions are made regarding Treasury bill futures contracts (even though futures contracts are not “securities”) because the asset *underlying* the futures contract (a Treasury bill) is a security.¹⁰³ Similarly, in this case, the Commission preliminarily concluded in the OSC that Amaranth’s trading in NG Futures Contracts actually set the NG Futures settlement price, which is directly incorporated into the pricing of physical natural gas within the Commission’s jurisdiction. Given the connections between the trading behavior at issue and physical natural gas markets, a finding that the “in connection with” requirement is met is appropriate.

⁹⁹ *Bankers Life & Cas. Co.*, 404 U.S. at 12 (quoting H.R. Rep. No. 1383, 73d Cong. 2d Sess. 7).

¹⁰⁰ Rehearing Request at 32.

¹⁰¹ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (emphasis added).

¹⁰² *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977).

¹⁰³ *Paine Webber, Jackson & Curtis, Inc. v. Conaway*, 515 F. Supp. 202, 210 (N.D. Ala. 1981). See also *Fisher v. Dean Witter Reynolds, Inc.* 526 F. Supp. 558, 560 (E.D. Pa. 1981) (fraud in the sale of treasury bills futures contracts violates SEC Rule 10b-5).

43. The cases cited by Amaranth to support its narrow construction of the “in connection with” requirement are inapposite.¹⁰⁴ First, *Ontario Pub. Serv. Employees v. Nortel Networks Corp.* is a *standing* case which concludes that one who is not actually injured by securities-related conduct cannot bring a private right of action.¹⁰⁵ Because the court found “that the plaintiffs lack standing under section 10(b), [the court did] not reach the ‘in connection with’ requirement.”¹⁰⁶ Second, *Rand v. Anaconda-Ericsson, Inc.*¹⁰⁷ (*Rand*) did not hold, as Amaranth contends, that the fraudulent conduct must be *in* a securities transaction. Instead, the court held that a press release declaring a company in default under a security agreement does not violate Rule 10b-5’s anti-fraud provision because the prohibited conduct did not have “incidental involvement of securities.”¹⁰⁸ The *Rand* court also noted that “misrepresentations about the financial condition of a broker-dealer were ‘in connection with’ a securities transaction where the broker-dealer’s financial strength was directly related to its ability to carry out obligations under agreements calling for the repurchase or resale of government securities. The misrepresentations went to the consideration for a securities transaction.”¹⁰⁹ Thus, the *Rand* court clearly acknowledged that the purchase or sale of securities in the securities market is not a pre-requisite to SEC jurisdiction.

44. Amaranth reads the securities cases, particularly *Zandford*, as permitting the “in connection with” test to be satisfied only where the manipulation “coincided with the sales themselves.”¹¹⁰ We do not read the cited language of *Zandford* as the complete expression of the test, but were it so, the test would certainly be satisfied on the facts of

¹⁰⁴ See Rehearing Request at 33.

¹⁰⁵ *Ontario Pub. Serv. Employees v. Nortel Networks Corp.*, 369 F.3d 27, 33 (2d Cir. 2004) (*Ontario*).

¹⁰⁶ *Id.* This decision did not address whether a regulator could enforce a prohibition on the identified conduct.

¹⁰⁷ 794 F.2d 843, 847 (2d Cir. 1986).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing in *SEC v. Drysdale Sec. Corp.*, 785 F.2d 38 (2d Cir. 1986)).

¹¹⁰ Rehearing Request at 32 (citing *Zandford*, 535 U.S. at 820).

this case.¹¹¹ The OSC alleges that Amaranth traded between 2:00 and 2:30 PM on each of the three settlement days with the specific intent and actual effect of artificially setting the price of the NG Futures Contracts. Further, the OSC alleges that within an instant of that trading, effectively at 2:31 PM, and as a direct result of that trading, the settlement price became the price for the above-identified physical sales at Henry Hub. It is difficult to imagine how much more “coincidence” there could be between Amaranth’s trading and Commission jurisdictional sales.

45. Finally, post-enactment oversight inquiries from Congress support the Commission’s determination regarding its anti-manipulation jurisdiction. Senator Bingaman, who was Ranking Member on the Senate Committee on Energy and Natural Resources when EAct 2005 was enacted, noted in a letter to the Commission that “the evolution of complex and interrelated markets for financial and physical energy commodities has elevated the importance of the Federal Energy Regulatory Commission’s . . . role.”¹¹² The Senator also inquired into “efforts [by the Commission] to monitor *trading of NYMEX gas futures contracts*, especially as it relates to end-of-month natural gas trading.”¹¹³ Similarly, the Government Accountability Office (GAO) noted that EAct 2005 gave the Commission authority to “examine whether financial market transactions, which are not generally under the Commission’s jurisdiction, affect the physical natural gas markets over which FERC has authority” and enforce it against any entity, if the manipulative trading, whether intentionally or recklessly, affects physical natural gas markets.¹¹⁴ These views are consistent with the Commission’s interpretation that section NGA section 4A properly applies to “producers, financial

¹¹¹ Although the *Zandford* court certainly determined that the securities transactions “coincide”[d] with the wrongful conduct and “therefore were in connection with” securities sales within the meaning of §10(b),” *Zandford* at 822, we do not read the opinion as holding that this “coincidence” is the only way to meet the “in connection with” requirement. We read *Zandford* as supporting the view that “[t]he precise contours of the in connection with requirement are not self-evident. It seems unavoidable ‘that the standard be fleshed out by a cautious case-by-case approach.’” *Chem. Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 942-43 (2d Cir. 1984).

¹¹² See Letter from Senator Bingaman, Chairman, Committee on Energy and Natural Resources, to Joseph Kelliher, Chairman, FERC (Feb. 6, 2007).

¹¹³ See *Id.* at 2 (emphasis added).

¹¹⁴ U.S. GOV’T. ACCOUNTABILITY OFFICE, ROLES OF FEDERAL AND STATE REGULATORS IN OVERSEEING PRICES at 16.

companies, local utilities, and natural gas traders, most of which were not previously regulated by FERC,” that engage in manipulative conduct that affect the Commission’s jurisdictional markets.¹¹⁵

B. The Commission’s Anti-Manipulation Authority As Compared to the CFTC’s Jurisdiction

46. Amaranth’s central contention is that manipulation of natural gas markets of the type alleged by the Commission in the OSC is within the CFTC’s “exclusive” jurisdiction and, therefore, even if the alleged conduct is covered by the NGA, the Commission is pre-empted from taking action.¹¹⁶ Explicit in Amaranth’s jurisdictional argument is the underlying notion that the financial and physical natural gas markets are “completely separate” markets (*see, e.g.* Amaranth CFTC Brief at 15), and that the CFTC is the only agency to police the financial markets, while the Commission may police only the physical natural gas market.¹¹⁷ We address each argument below.

1. CFTC’s Exclusive and Non-Exclusive Jurisdiction

47. Amaranth contends that section 2(a)(1)(A) of the CEA conclusively establishes that the CFTC has exclusive jurisdiction over Amaranth’s conduct.¹¹⁸ The CEA provides that “[t]he Commission [CFTC] shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery.”¹¹⁹ This Commission indisputably recognizes that the CFTC has exclusive jurisdiction over transactions involving contracts of sale of a commodity for future delivery, *i.e.*, futures transactions, just as this Commission has exclusive jurisdiction over rates, terms and conditions of jurisdictional sales of resale of natural gas in interstate commerce, *i.e.*, physical transactions. The fact that the CFTC has exclusive jurisdiction over these activities does not mean that it has exclusive jurisdiction over fraudulent or deceptive practices associated with those transactions, or that other agencies such as this Commission are precluded from examining fraudulent or deceptive conduct in exercising their regulatory responsibilities, particularly where this Commission has

¹¹⁵ *Id.* at 15. *See also* Order No. 670 at PP 2, 18, and 22.

¹¹⁶ Rehearing Request at 12-16.

¹¹⁷ *Id.* at 13-16.

¹¹⁸ *Id.* at 22.

¹¹⁹ 7 U.S.C. § 2(a)(1)(A) (2006).

been provided express authority with respect to such conduct if it has a nexus to jurisdictional physical sales.¹²⁰ For the reasons discussed below, we do not believe it is reasonable to interpret section 2(a)(1)(A) of the CEA, when read in conjunction with other provisions of law, to give the CFTC exclusive jurisdiction over manipulative conduct involving futures transactions.

48. A line of court decisions under the CEA, known as the “exempt commodities cases,” support the position that the CFTC does not have exclusive jurisdiction as to manipulation. The CEA provides that “agreements, contracts, and transactions” in “exempt” commodities, such as natural gas, are beyond the CFTC’s jurisdiction.¹²¹ However, to assert jurisdiction over false reporting, manipulation, and other fraudulent and deceptive conduct in exempt commodities, the CFTC successfully argued that manipulation and deceptive conduct, by their very nature, do not involve a “mutual understanding” creating enforceable rights or obligations with counterparties and, therefore, such conduct is not a “contract, agreement or transaction,” but merely conduct *related to* a “contract, agreement or transaction” in a commodity.¹²² In *CFTC v. Bradley*,¹²³ the CFTC argued it had jurisdiction under the CEA to punish the manipulative conduct of knowingly providing false and misleading information concerning natural gas transactions. The CFTC argued that such manipulative conduct is not a “contract, agreement, or transaction,” because those terms, “as commonly understood, denote[] a mutual understanding between the parties creating rights or

¹²⁰ See *FTC v. Roberts*, 276 F.3d 583, 591 (D.C. Cir. 2001) (“it does not follow from this, however, that Congress intended to preempt the activities of all other federal agencies in their regulatory realms.”).

¹²¹ See 7 U.S.C. §§ 2(a) (exclusive jurisdiction provision), 2(g) and 2(h) (exemptions from § 2(a)) (2000).

¹²² *Roberts*, 276 F.3d at 591. See also *CFTC v. Reed*, 481 F. Supp. 2d 1190 (D. Colo. 2007); *U.S. v. Valencia*, No. 03-024, 2003 U.S. Dist. LEXIS 15264 (S.D. Tex. Aug. 25, 2003); and *CFTC v. Atha*, 420 F. Supp. 2d 1373 (N.D. Ga. 2006). These cases involved interpretation of a parallel provision of the CEA that uses the terms “contract, agreement, or transaction.” Given the parallel language and same broad remedial purpose, the interpretation should be the same.

¹²³ 408 F. Supp. 2d 1214 (N.D. Okla. 2005).

obligations that are enforceable or recognized by law.”¹²⁴ The court sustained that argument.

49. Accordingly, these cases stand for the general proposition that in interpreting the exclusive and non-exclusive jurisdiction under the CEA, manipulation does not involve a mutual understanding or meeting of the minds necessary to consummate an “account, agreement, or transaction,” or a “contract, agreement, or transaction” as those terms are commonly understood and, therefore, manipulation is neither excluded from CFTC’s jurisdiction over otherwise “exempt commodities” nor is it within the CFTC’s *exclusive* jurisdiction. Although most of these cases involved manipulation of markets caused by false reporting of information (a fact not present here), the CFTC recently filed a case against Energy Transfer Partners (ETP), alleging attempted manipulation that did not involve false reporting.¹²⁵ In *ETP*, the CFTC maintains that it has jurisdiction over manipulative trading in physical natural gas markets, which are otherwise exempt from the CFTC’s jurisdiction, because manipulative conduct is not a “contract, agreement, and transaction.” By extension, manipulation is also not within the CFTC’s exclusive jurisdiction.

50. The case of *FTC v. Roberts (Roberts)* is the most recent and comprehensive review of this subject and makes the distinction between the CFTC’s exclusive

¹²⁴ *Id.* at 1219 (quoting Black’s Law Dictionary 318 (7th Ed. 1999)). In *CFTC v. Reed*, 481 F. Supp. 2d 1190 (D. Colo. 2007), the CFTC successfully argued that “false reporting of market information concerning natural gas and attempted manipulation of natural gas price indices [] does not implicate an ‘agreement, contract, or transaction.’” *Id.* at 1198 (quoting *U.S. v. Valencia*, No. 03-024, 2003 U.S. Dist. LEXIS 15264 at * 36 (S.D. Tex. Aug. 25, 2003)). See also *CFTC v. Atha*, 420 F. Supp. 2d 1373 (N.D. Ga. 2006) (false price reporting is not an account, agreement or transaction). Most recently, the court in *CFTC v. Johnson*, 408 F. Supp. 2d 259 (S.D. Tex. 2005) held that false reporting of natural gas transactions is not an “account, agreement, or transaction” and, therefore, the CFTC had jurisdiction over attempted manipulation of natural gas prices.

¹²⁵ As with this matter, the Commission’s staff coordinated its lengthy investigation with a parallel investigation by the CFTC staff into alleged market manipulation of physical natural gas by ETP. Those investigations, as here, resulted in simultaneous enforcement actions by the two agencies, including the CFTC asserting its jurisdiction in a complaint filed in the United States District Court for the Northern District of Texas. *CFTC v. Energy Transfer Partners, L.P.*, Civil Action No. 3-07-Cv. 1301 (N.D. Texas). The Commission’s Order to Show Cause issued to *ETP* in IN06-3-002.

jurisdiction over “accounts, agreements, and transactions” and its non-exclusive jurisdiction over fraudulent and deceptive practices. *Roberts* explained that “while the CFTC has clear statutory authority to regulate a [trader’s] deceitful ‘practices’ there is no reason to think the authority is exclusive. A ‘practice’ or ‘course of business’ is quite plainly not a ‘transaction’ – either in life or in this statutory provision. (Nor for that matter is it an ‘account’ or ‘agreement.’).”¹²⁶ The D.C. Circuit held in *Roberts* that the notion that whatever the CFTC regulates it does so exclusively is a “specious contention.”¹²⁷ Thus, the case law supports the interpretation that the exclusive jurisdiction provision cited by Amaranth does not apply to Amaranth’s alleged manipulative conduct¹²⁸ and, the CEA language notwithstanding, “other agencies . . . retain their jurisdiction beyond the confines of ‘accounts, agreements, and transaction’” for futures contracts.¹²⁹

51. The majority of cases cited by Amaranth in support of the claim that the CFTC has exclusive jurisdiction in this case address the narrow question of whether CFTC or the SEC has enforcement jurisdiction *in the first instance* over certain market segments and products.¹³⁰ None of these cases address whether the particular manipulative activity

¹²⁶ 276 F.3d at 591.

¹²⁷ *Id.*

¹²⁸ See also *SEC v. Hopper*, No. 04-1054, 2006 U.S. Dist. LEXIS 17772 at *37-42 (S.D. Tex. Mar. 24, 2006) (because energy trading transactions were fraudulent and deceptive within the meaning of Rule 10b-5, the SEC could proceed at the same time as the Commission and the CFTC); *U.S. v. Reliant Energy Serv.*, 420 F. Supp. 2d 1043, 1045 (N.D. Cal. 2006) (the Commission’s exclusive jurisdiction under the FPA to regulate the transmission and sale at wholesale of electricity in interstate commerce did not preempt the anti-manipulation jurisdiction under the CEA pertaining to electricity prices during the Western energy crisis).

¹²⁹ *Roberts*, 276 F.3d at 591.

¹³⁰ Rehearing Request at 35-36 (citing *Chicago Merc. Exch. v. SEC*, 883 F.2d 537 (7th Cir. 1989), *Chicago Bd. Of Trade v. SEC*, 677 F.2d 1137 (7th Cir. 1982), *SEC v. Am. Commodity Exch.* 546 F.2d 1361 (10th Cir. 1976), and *SEC v. Univest, Inc.*, 405 F. Supp. 1057, 1058 (N.D. Ill. 1975)). Each case resolved a dispute over whether a certain financial product was a futures contract or an option on a futures contract subject to the exclusive jurisdiction of the CFTC, or a security or an option on a security subject to SEC regulation.

was subject to the jurisdiction of both agencies or whether the manipulation was “in connection with” the SEC’s jurisdictional markets, *i.e.*, whether the conduct might fall within both agencies’ non-exclusive jurisdiction. Indeed, in *Chicago Merc. Exch. v. SEC*, the court expressly stated it was not deciding the related question of whether the SEC has authority to apply its anti-fraud rules to commodity options transactions.¹³¹ The other cases cited by Amaranth generally resolve broad questions of whether the SEC could set terms or perform other “prospective” oversight or regulation over designated contract markets, a question not present here.¹³² In any event, these cases pre-date the 2000 amendments to the CEA, which affirmed the SEC’s jurisdiction over fraud claims involving futures.¹³³

2. The CEA “Other Regulatory Authorities” Savings Clause and the Commission’s Jurisdiction

52. Even if the conduct alleged by the Commission in the OSC could be read to fall within the text of the exclusive jurisdiction provision of the CEA, “it does not follow. . . . that Congress intended to preempt the activities of all other federal agencies in their regulatory realms. . . . Preemption of the regulation of the market does not also mean preemption of all law that might involve participants in the market.”¹³⁴ This is clarified in the “savings clause” contained in the CEA.

¹³¹ 883 F.2d 537 (7th Cir. 1989).

¹³² *Chicago Bd. of Trade v. SEC*, 677 F.2d 1137 (7th Cir. 1982); *Chicago Merc. Exch. v. SEC*, 883 F.2d 537 (7th Cir. 1989).

¹³³ In 2000, Congress passed the Commodities Futures Modernization Act (CFMA), which amended and re-authorized portions of the CEA. One purpose of the CFMA, *inter alia*, was to clarify that the CFTC and the SEC would *share* jurisdiction over products that had characteristics of both securities and futures. Because section 10(b) and Rule 10b-5 serve as the model for section 4A and Order No. 670, the legal precedent upholding the SEC’s jurisdiction over fraud and manipulation in these “non-securities” transactions that involve a security as the underlying commodity strongly supports the Commission determination that the CEA does not eclipse section 4A.

¹³⁴ *Roberts*, 276 F.3d at 591 (quoting *Poplar Grove Planting and Ref. Co. v. Bache Halsey Stuart Inc.*, 465 F. Supp. 585, 592 (D. La. 1979)).

53. The CEA savings clause, which immediately follows the exclusive jurisdiction provision, states:

Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or any state, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.^[135]

54. The purpose of any savings clause is to “preserve something from immediate interference.”¹³⁶ Contrary to Amaranth’s claim, there is no evidence that Congress intended the savings clause to prevent a “regulatory overlap” between the CFTC and the Commission over manipulation of natural gas markets. Instead, “[i]nclusion of the so-called ‘regulatory savings clauses,’ § 2(a)(1)(A)(I)-(II), makes clear that other agencies . . . retain their jurisdiction beyond the confines of ‘accounts, agreements, and transactions involving contracts of sale of a commodity for future delivery.’”¹³⁷ The expansive anti-manipulation authority given to the Commission in NGA section 4A and FPA section 222 was enacted by Congress five years subsequent to the most recent amendments to the CEA, and several years after the Commission uncovered the manipulative practices occurring in both natural gas and electric markets in connection with its investigation of the Western energy crisis of 2000-2001. More to the point, neither section 4A nor section 222 contain a savings clause, suggesting that Congress did not intend the CEA to trump the broad authority conferred on the Commission to take action against any entity that directly or indirectly employs, in connection with a purchase or sale subject to the jurisdiction of the Commission, a manipulative device. We interpret the CEA’s section 2(a) savings clause to simply preserve any and all authority conferred to the Commission by Congress.¹³⁸

¹³⁵ 7 U.S.C. § 2(a)(1)(A) (2006).

¹³⁶ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920).

¹³⁷ *Roberts*, 276 F.3d at 591 (quoting *Chicago Merc. Exch. v. SEC*, 883 F.2d 537, 550 (7th Cir. 1989) (section 2 “carries no implicit pre-emptive force”)).

¹³⁸ Similarly, the savings clause in NGA section 23(c)(2) likewise preserves the jurisdiction conferred by the CEA to the CFTC. That provision does not, as Amaranth contends at page 19 of its Rehearing Request, establish that Congress intended to withhold regulatory power from the Commission.

55. Amaranth's argument that the CEA permits the Commission to retain jurisdiction only for matters "beyond the confines of accounts, agreements, and transactions involving contracts of sale of a commodity for future delivery"¹³⁹ is not in conflict with our own view. The manipulation in this case (as in the CFTC's cases pertaining to manipulation of physical natural gas) is conduct that goes "beyond" the "confines" of "accounts, agreements, and transactions."¹⁴⁰ However, if there is any doubt on this score, we interpret the savings clause, in conjunction with the broad wording of section 4A itself and Congress' reasons for adding the anti-manipulation provisions to the NGA and FPA, to resolve the issue in favor of our jurisdiction.

56. We do not interpret the phrase "except as hereinabove" in the CEA savings clause to transfer any jurisdiction over "accounts, agreements, and transactions" from other agencies to the CFTC. This would render the savings clause superfluous and would exclude other agencies (both federal and state) from taking any action with respect to those activities and there would be no need for a savings clause. The better view, which is consistent with basic rules of statutory construction and legal precedent discussing the purpose of savings clauses, is that the phrase "except as hereinabove provided" means that, unless Congress expressly modified "hereinabove" the jurisdiction of the SEC or other federal agencies, the jurisdiction of the SEC and other federal agencies remains undisturbed.¹⁴¹

3. The Commission's Overall Construction of the Statutes

57. The Commission's jurisdictional determination is in harmony with Congress' more recent expression on these related issues, EPLA 2005, as well as judicial precedent permitting multiple agencies to protect their respective constituents.¹⁴² Indeed, the

¹³⁹ Rehearing Request at 15.

¹⁴⁰ *Id.* at 15-16.

¹⁴¹ In fact, Congress did just that in preceding sections where it divided certain areas of responsibility between the CFTC and SEC. *See, e.g.,* 7 U.S.C § 2(a)(1)(D). We recognize that a 1975 decision of a United States District Court, subsequently remanded without opinion, reached a contrary construction of the savings clause. *SEC v. Univest, Inc.*, 405 F. Supp. 1057, 1058 (N.D. Ill 1975). Our review of that opinion discloses virtually no analysis of the issues and we choose instead to follow an analysis which is more consistent with overall statutory scheme before us and the much more recent and thorough analysis of the D.C. Circuit in *Roberts* as noted above.

¹⁴² *See FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948) (two or more agencies may proceed simultaneously against the same parties and the same conduct); *Bristol-Meyers* (continued...)

foregoing analyses are the most reasonable way to harmonize the various provisions and precedents relating to our jurisdiction, the jurisdiction of the CFTC, and cases construing section 10(b) of the Securities Exchange Act, which served as the model for new NGA section 4A and the parallel FPA section 222.¹⁴³ It is a basic tenet of statutory construction that when courts are construing different statutes on the same subject matter, they do so in a way that gives effect to each.¹⁴⁴ Amaranth's interpretation undermines the very intent of section 4A to give the Commission ability to sanction manipulation that has a clear nexus to and significant effect on jurisdictional prices.

58. The Commission's determination does not interfere with the CEA's mandate that the CFTC regulate exclusively the day-to-day aspects of futures trading (albeit not manipulation), such as the terms or conditions of sale of NG Futures contracts, the operating rules of the NYMEX exchange, or traders' commodity accounts. The CFTC focuses its efforts on regulating instruments related to sixty-seven products and making sure that "designated contract markets," such as the NYMEX, operate properly. The CFTC is not focused on the underlying or downstream markets. The Commission respects these exclusive regulatory functions and the CFTC's expertise and exclusive regulatory authority with respect to operation of the futures markets for dozens of commodities. The Commission does not seek to police the NYMEX or other exchanges, nor does the Commission seek to prevent Amaranth from trading on futures markets. Instead, the Commission is exclusively concerned with protecting the integrity and competitiveness of energy markets. When manipulation of NG Futures Contracts spans both financial and energy markets, the Commission has authority to investigate and, if

Co. v. FTC, 738 F.2d 554, 559-60 (2d Cir. 1984) (concurrent Federal Trade Commission/Food and Drug Administration jurisdiction approved); *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948, 952-53 (D.D.C. 1973) (court upheld concurrent enforcement action by the FDA and FTC, even though they involved the same parties or issues, because the statutory remedies of the two agencies are cumulative and not mutually exclusive). *See also U.S. v. Reliant Energy Serv.*, 420 F. Supp. 2d 1043, 1064 (N.D. Cal. 2006) (where two federal laws cover the same conduct, both may be applied because "congressional intent behind one federal statute should not be thwarted by the application of another federal statute").

¹⁴³ It is a fundamental canon of statutory construction that statutes relating to the same subject matter should be construed harmoniously and, if not, the more recent or specific statute should prevail over the older and more general law. *Tug Allie-B. v. U.S.*, 273 F.3d 936, 941 (11th Cir. 2001).

¹⁴⁴ *United States v. Borden Co.*, 308 U.S. 188, 191 (1939) (where two statutes address the same subject, the "rule is to give effect to both if possible").

appropriate, punish that manipulation that affects its jurisdictional markets. Congress recognized through EAct 2005 that both agencies have an enforcement role to protect their respective markets and interests. We pursued this role in the present case and the CFTC has taken similar action in its manipulation case against ETP. There, the CFTC alleged that ETP manipulated futures markets subject to its jurisdiction, even though the alleged misconduct occurred in physical natural gas markets that are subject to our exclusive jurisdiction, not that of the CFTC. There, as here, each agency has merely sought to police manipulation that substantially impairs the competitiveness of the markets it regulates.

59. The legislative history of EAct 2005 confirms that Congress expanded the Commission's jurisdiction, while the CFTC's day-to-day market oversight program was already well known.¹⁴⁵ In fact, a few Senators expressed concern that the Cantwell Amendment would lead to "unnecessary duplication" of effort by enforcement agencies such as the SEC and the CFTC.¹⁴⁶ Congress nevertheless "put in place the first ever broad prohibition on manipulation in electricity and natural gas markets."¹⁴⁷ Congress knew that it was placing an additional cop on the beat alongside the CFTC and the SEC by giving FERC additional tools to ensure that manipulative and deceptive practices do not occur in energy markets. Thus, Congress expected to hold "FERC [not just the CFTC] accountable if, in fact, manipulative or deceptive practices occur in the future."¹⁴⁸

¹⁴⁵ 149 Cong. Rec. S 13997 at 9 (daily ed. Nov. 5, 2005) (statement of Sen. Bennett) (Both the CFTC and the SEC have broad authority to prohibit market manipulation); 151 Cong. Rec. S 7451 at 40 (daily ed. June 28, 2005) (statement of Sen. Cantwell) (the Cantwell Amendment, which was eventually incorporated into EAct 2005, gave FERC the tools to prevent abuses in energy markets). *See also* 151 Cong. Rec. S 9335 at 16-17 (daily ed. June 29, 2005) (statement of Sen. Cantwell) ("This Energy bill puts in place the first ever broad prohibition on manipulation of electricity and natural gas markets" and is modeled on a measure authored by Senator Cantwell and passed twice in the Senate).

¹⁴⁶ *See* 149 Cong. Rec. S 13997 at 9 (daily ed. Nov. 5, 2005) (statement of Sen. Bennett).

¹⁴⁷ 151 Cong. Rec. S 9335 at 17 (daily ed. July 29, 2005) (statement of Sen. Cantwell).

¹⁴⁸ 149 Cong. Rec. S 10173 at 21 (daily ed. July 30, 2003) (statement of Sen. Bingaman). In our view, Congress' delegation to FERC in new section 4A indicates Congress' recognition that the Commission has expertise to bring to bear on matters of

(continued...)

60. The legislative history of EAct 2005 also confirms that Congress expressly rejected a proposal to state that the CFTC's exclusive jurisdiction was not trumped by the NGA. The House Energy and Commerce Committee Report on HR 6 contained a completely new provision to be added to the NGA, known as "section 26," which provided that *nothing* in the NGA shall affect the "exclusive jurisdiction of the [CFTC] with respect to 'accounts, agreements, or transactions in commodities under the CEA.'"¹⁴⁹ However, that provision was rejected, as it does not appear in the final bill. Instead, Congress included only a narrower savings clause in section 23 (Natural Gas Market Transparency Rules), which provides that nothing in that section (pertaining to gathering information from market participants) can be construed to limit the CFTC's exclusive jurisdiction. Nowhere in the EAct 2005 amendments, whether a savings clause or elsewhere, did Congress indicate any intent to give only the CFTC authority over manipulative practices. Having considered the matter, had Congress intended to confer upon the CFTC exclusive jurisdiction over manipulation occurring in natural gas futures markets, it could have done so explicitly in the NGA section 4A and FPA section 222 sections, incorporated "section 26" into the NGA as a whole, or, at a minimum, included the savings clause in the NGA's Anti-Manipulation provision, section 4A. Instead, section 4A makes no mention of the CFTC's jurisdiction nor does it contain a savings clause, which is included in the more narrowly focused section 23.¹⁵⁰ Congress made an explicit choice to refer to the CFTC's exclusive jurisdiction only in the regulatory arena of information gathering, not in the Anti-Manipulation jurisdictional section at issue here. Thus, with respect to day-to-day regulation, such as gathering data as discussed in NGA section 23, the CFTC's jurisdiction is exclusive and the agencies must work through each other. With respect to enforcement against manipulation as specified in section 4A, jurisdiction is not exclusive and Congress did not include a savings clause. Therefore, Amaranth's arguments about the meaning of this savings clause in section 23 are unpersuasive and, in fact undercut Amaranth's position that Congress intended section 4A to confer only limited jurisdiction to the Commission.

61. Amaranth also misconstrues the Commission's discussion in the OSC regarding NGA section 23 and its language pertaining to the MOU with the CFTC.¹⁵¹ The Commission does not contend that section 23 confers jurisdiction over manipulation

energy market manipulation. As we noted in the OSC, Commission staff includes experts in both the physical and financial natural gas markets. OSC at P 52.

¹⁴⁹ H. R. Rep. No. 109-49, at 7 (2005).

¹⁵⁰ See EAct 2005 § 316(c)(1).

¹⁵¹ Rehearing Request at 16-17 (discussing OSC at P 48).

claims.¹⁵² The statutory authority to issue the OSC comes from section 4A, not section 23. Instead, the Commission states that section 23 supports its construction of section 4A.

62. The Commission largely agrees with Amaranth that section 23 authorizes the Commission to collect information from market participants about the availability and prices of natural gas. Section 23 reflects Congress' recognition of the potential for the Commission and the CFTC to seek the same information, so it required the Commission and the CFTC to coordinate their data gathering activities. However, there is nothing in section 23 that prohibits the Commission from using that information in any investigation of manipulation, nor is there any language in section 23 suggesting that inter-agency coordination under the MOU would not include investigations. It is an odd notion indeed that Congress intended the Commission to gather information pertaining to exchanges under the CFTC's jurisdiction, but if we thereby detected manipulation affecting our jurisdictional markets to have no enforcement role to punish and deter such manipulation. Unremarkably, the MOU itself and the year-long joint Commission-CFTC investigation of Amaranth's conduct illustrate that both agencies (at least until recently) read the statute to contemplate joint investigation activities that go beyond the collection of information when they agreed that: "the CFTC and the FERC may from time to time engage in oversight *or investigations of activity affecting both CFTC-jurisdictional and FERC jurisdictional markets.*" MOU at 3 (emphasis added).

C. The Commission's Assertion of Jurisdiction in the OSC As Compared to Order No. 670

63. Amaranth's final assertion is that the Commission's determination that it has jurisdiction in this matter departs from Order No. 670.¹⁵³ Amaranth contends that the statement in Order No. 670 that "this Final Rule does not, and is not intended to, expand the types of transactions subject to the Commission's jurisdiction," is a concession by the Commission that its anti-manipulation subject matter jurisdiction is limited to "wholesale transactions that remain within the ambit of the NGA, NGPA, and FPA."¹⁵⁴ Amaranth's argument, which takes a few words in Order No. 670 out of context, is unavailing.¹⁵⁵

¹⁵² OSC at PP 3, 44-45.

¹⁵³ Rehearing Request at 39-41.

¹⁵⁴ *Id.* at 40.

¹⁵⁵ NARUC characterized Amaranth's argument as "exceptionally convoluted." NARUC *Amicus* Brief at 11.

64. Order No. 670 clarified that EAct 2005 broadened the Commission's overall jurisdiction to prohibit any entity, directly or indirectly, from using a manipulative or deceptive device in connection with the purchase or sale of natural gas subject to the jurisdiction of the Commission. In Order No. 670 we delineated the elements essential to manipulation: "an entity: (1) . . . engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite *scienter*; (3) in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission."¹⁵⁶ The language Amaranth points to deals only with the second part of the third element. As stated in Order No. 670, and we reiterate here, EAct 2005 did not affect the Commission's jurisdiction under NGA section 1(b) to regulate ratemaking of interstate commerce and wholesale transactions of natural gas, and non-affiliated entities.¹⁵⁷ In fact, we agreed with commentators in the Anti-Manipulation Rule rulemaking, and re-affirm here, that the scope of "transactions" in that third element is the same as that covered by pre-existing NGA provisions and was not expanded by EAct 2005.¹⁵⁸ Consequently, in neither Order No. 670 nor the OSC did the Commission assert that EAct 2005 expanded the types of jurisdictional transactions that would satisfy section 4A's requirement that the affected markets must be "subject to the Commission's jurisdiction." For this reason, by way of example, we noted that a manipulation pertaining only to a "first sale" would not be covered.¹⁵⁹

65. However, the broad language of section 4A enlarged the conduct (as identified in the other elements) with respect to those transactions that we can regulate.¹⁶⁰ Order No. 670 elsewhere clearly provides that manipulative or deceptive conduct that affects the very same jurisdictional markets identified in section 1(b) would be subject to the Commission's broader Anti-Manipulation Rule.¹⁶¹ Moreover, the statement in Order No. 670 that the new regulations apply where there is a *nexus* between fraud and a

¹⁵⁶ Order No. 670 at P 49.

¹⁵⁷ 15 U.S.C. § 717b (2005).

¹⁵⁸ Order No. 670 at P 20.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at P 21 (specifically rejecting comment urging that section 4A did not increase the Commission's reach beyond the rules already promulgated).

¹⁶¹ *Id.* at P 22 ("the Commission views the 'in connection with' element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction.").

jurisdictional transaction (as opposed to conduct that *is* a jurisdictional transaction) is consistent with section 4A's "in connection with" requirement.¹⁶² In this case, the Commission preliminarily finds that the requisite nexus is established because Amaranth's manipulation directly and substantially affected *jurisdictional* transactions. Therefore, the Commission's preliminary findings in the OSC are entirely consistent with EAct 2005, the Anti-Market Manipulation Rule, and Order No. 670.

III. Conclusion

66. The Commission denies Amaranth's request for expedited rehearing on the issue of the Commission's jurisdiction to punish manipulative trading of NG Futures Contracts that had a direct effect on the price of physical natural gas within the Commission's jurisdiction. The Commission's determination is supported by the language of the NGA; it is consistent with, and does not infringe upon, the jurisdiction of the CFTC; and it furthers the objective of the NGA to ensure that energy markets remain fair and competitive. Our tolling order in this docket, dated September 26, 2007, remains in effect as to all other timely filed rehearing requests. In addition, pursuant to the Notice issued October 12, 2007, Respondents shall now answer the OSC, as specified in P 140(a) and (b) of the OSC, not later than 14 days from the issuance of this Order.

The Commission orders:

Amaranth's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶² *Id.* at P 16 (“[a]bsent such *nexus to a jurisdictional transaction* . . . fraud and manipulation in a non-jurisdictional transaction (such as a first or retail deal) is not subject to the new regulations.”) (emphasis added).