C A D W A L A D E R

Cadwalader, Wickersham & Taft LLP
700 Sixth Street, N.W., Washington, DC 20001
Tel +1 202 862 2200 Fax +1 202 862 2400
www.cadwalader.com

New York London Charlotte Washington
Houston Beijing Hong Kong Brussels

August 10, 2016

ELECTRONIC FILING

Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: *BP America Inc., et al.* – Docket Nos. IN13-15-000 and IN13-15-001 – Request for Rehearing of Opinion No. 549, "Order on Initial Decision and Rehearing" of BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company ("Request for Rehearing")

Dear Secretary Bose:

Pursuant to Section 19(a) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(a) (2012), and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.713 (2016), BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively "BP") hereby submit this Request for Rehearing of the Commission's Opinion No. 549, "Order On Initial Decision and Rehearing," issued on July 11, 2016, which, *inter alia*, upheld the findings of an Initial Decision issued on August 13, 2015 in the above-captioned dockets.

Some limited portions of this Request for Rehearing contain confidential information that has been treated as protected material and redacted throughout this proceeding. Thus, in accordance with 18 C.F.R. § 388.112 and the protective order issued in this proceeding, BP hereby requests that those portions of the Request for Rehearing be treated as protected and be exempted from public disclosure. To implement this request, and in compliance with the Commission's regulations, attached hereto is an unredacted version of this Request for Rehearing that is marked with the legend, "**PROTECTED MATERIAL – DO NOT RELEASE**" on the front page and each page on which protected material appears. Protected material has also been enclosed with boxes in order to assist the Commission in identifying such material. In addition, and pursuant to 18

Mark R. Haskell Tel +1 202 862 2200 Fax +1 202 862 2400 mark.haskell@cwt.com

C.F.R. § 388.112(b)(2)(ii), BP has included in this filing a redacted, public version of the Request for Rehearing, which has been marked as such.

Respectfully submitted,

/s/ Mark R. Haskell
Mark R. Haskell

Counsel to BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company

Enclosures

** PUBLIC VERSION **

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST FOR REHEARING OF OPINION NO. 549, "ORDER ON INITIAL DECISION AND REHEARING" OF BP AMERICA INC., BP CORPORATION NORTH AMERICA INC., BP AMERICA PRODUCTION COMPANY, AND BP ENERGY COMPANY

Timothy L. Moorehead
Managing Counsel
BP Legal Global Litigation
BP America Inc.
501 Westlake Park Boulevard
Houston, TX 77079
(832) 664-2882
timothy.moorehead@bp.com

Betsy Carr
Sr. Counsel – IST Legal
BP America Inc.
201 Helios Way
Houston, TX 77079
(713) 323-6353
betsy.carr@bp.com

Mark R. Haskell
George D. Billinson
Brett A. Snyder
Thomas R. Millar
Mary K. Treanor*
Cadwalader, Wickersham & Taft LLP
700 Sixth Street NW
Washington, DC 20001
(202) 862-2200
mark.haskell@cwt.com
george.billinson@cwt.com
brett.snyder@cwt.com
tom.millar@cwt.com
mary.treanor@cwt.com

*Admitted in New York only

Dated: August 10, 2016

** PUBLIC VERSION **

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UNITED STATES OF AMERICA
BEFORE THE
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BP America Inc.	**)**	
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BP Energy Company	**)**	

REQUEST FOR REHEARING OF OPINION NO. 549, "ORDER ON INITIAL DECISION AND REHEARING" OF BP AMERICA INC., BP CORPORATION NORTH AMERICA INC., BP AMERICA PRODUCTION COMPANY, AND BP ENERGY COMPANY

Pursuant to Section 19(a) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(a) (2012), and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.713 (2016), BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively "BP") hereby submit this Request for Rehearing of the Commission's Opinion No. 549, Order On Initial Decision and Rehearing issued on July 11, 2016 ("Opinion No. 549"), which, *inter alia*, upheld the findings of an Initial Decision issued on August 13, 2015 ("Initial Decision" or "ID") in the above-captioned dockets.[1] In support of its Request for Rehearing, BP states as follows:

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[1] *BP America Inc.*, Order on Initial Decision and Rehearing, 156 FERC ¶ 61,031 (2016), *aff'ing* Initial Decision ("ID"), *BP America Inc.*, 152 FERC ¶ 63,016 (2015) ("Opinion No. 549"). Opinion No. 549 also denied rehearing of the Commission's May 15, 2014 Order initiating hearing in the above-captioned proceeding and denying BP's motion to dismiss. *BP America Inc.*, 147 FERC ¶ 61,130 (2014). BP does not seek rehearing of the portions of Opinion No. 549 denying BP's prior request for rehearing that are now final. BP does seek rehearing of the issues identified herein that involve the application of the legal principles addressed in the order denying rehearing of the May 15, 2014 order to the record evidence in this case, as well as new arguments raised by the Commission for the first time in Opinion No. 549 based on court decisions issued after the issuance of the May 15, 2014 order. BP will file a timely petition for review of that portion of Opinion No. 549 in an appropriate forum and seek such other relief as may be warranted in that proceeding.

I. PRELIMINARY STATEMENT

This preliminary statement provides an overview of BP's core objections to Opinion No. 549, which is not the product of reasoned decisionmaking and is not supported by substantial evidence. Opinion No. 549 is arbitrary, capricious, and contrary to law. Consistent with Commission regulation, the numerous specific flaws that make up Opinion No. 549 are detailed in the following Statement of Issues and Specifications of Error.

Opinion No. 549 disregards controlling precedent in shifting the burden of persuasion in this proceeding to BP. Opinion No. 549 presumes rather than proves the existence of specific intent to manipulate and manipulative conduct by BP. That error pervades every component of the analysis, from the identification of the alleged manipulative conduct, to the claims of unprofitable trading, to the alleged "confluence of acts" to further the presumed "scheme to manipulate" that the Commission's Enforcement Staff ("OE") alleges but does not prove, to the issues of scienter and intent, to disputes regarding jurisdiction, and to the unfounded "consciousness of guilt" theory adopted in the ID and Opinion No. 549. It also affects the calculation of remedies in this case.

This error concerning who has the burden of proof is compounded by additional errors, all of which had the effect of skewing this proceeding in favor of OE,[2] in a manner that is both arbitrary and capricious and contrary to law. Opinion No. 549 accepts the

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[2] As noted in BP's Brief on Exceptions at 13 & n.82, the ID erroneously permitted OE to use investigative depositions that were not made available to BP until years after they were taken in a manner inconsistent with Commission rules and inconsistent with Commission precedent. 18 C.F.R. § 1b.12; 18 C.F.R. § 385.405 (2016). As discussed herein, OE also was permitted to violate Commission hearing rules regarding producing privilege logs.

ID's categorical determination that all OE witnesses were credible and no BP witnesses were credible. As a result, the ID asserted that BP's evidence, particularly its expert witness testimony, was entitled to "no weight." Opinion No. 549 concurs with the ID's allegation. This finding is plain error. The Commission was required on review of the ID to establish a "logical bridge" between its acceptance of the ID's unwarranted credibility determinations and its rejection of BP's expert testimony in its entirety. That "logical bridge" had to be supported by substantial evidence. It is not. As the Fourth Circuit has held: "[o]therwise, savvy ALJ's could simply ground their judgments in broad, categorical statements that they credit all of one party's witnesses and discredit all of the other party's witnesses, and thereby effectively insulate their decisions from meaningful judicial review."[3] That is precisely what happened in this case.

Opinion No. 549 errs again in giving weight to OE expert testimony on the subjective intent of BP traders, contrary to federal precedent.

Opinion No. 549 is rife with inconsistencies. For example, on the issue of intent, Opinion No. 549 relies on the claim that BP's physical trading was profitable on and after November 6, 2008, after the Comfort/Luskie call on November 5. However, on the issue of remedies, Opinion No. 549 takes the facially inconsistent position that the alleged manipulation continued throughout November (on and after November 6) because the alleged "scheme" continued. On the issue of jurisdiction, Opinion No. 549 represents that "[s]ince Congress imbued it with new anti-manipulation authority, the Commission has always interpreted the scope of this authority solely in terms of protecting jurisdictional markets, and as such any effect on non-jurisdictional activities is merely

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[3] *Be-Lo Stores v. N.L.R.B.*, 126 F.3d 268, 279 (4th Cir. 1997).

incidental to this protective function."[4] On the issue of remedies, the Commission calculates harm to the "market" solely by reference to non-jurisdictional intrastate transactions. The two statements cannot be meaningfully reconciled.

Opinion No. 549 also attempts to justify its conclusions by: (a) presuming that a "confluence of factors," any one of which would prove nothing about market manipulation, can collectively suffice to prove intent to defraud; (b) disregarding record evidence that the same changed trading patterns identified by OE witnesses as "manipulative" occurred at times when no manipulation was alleged and tracked the actions of other large market participants in the Houston Ship Channel ("HSC") market during the relevant time period; (c) presuming that a scheme exists based on "consciousness of guilt;" and (d) engaging in selection bias by choosing an artificially truncated "Pre-IP" period to bolster its claims, contrary to record evidence.[5]

Opinion No. 549 alleged that a finding of a consistent pattern of trading losses warranted a finding of manipulative intent, but turned a blind eye to record evidence showing that the methodology used to define the alleged losses was fatally flawed and that the losses were neither consistent nor heavy. Further, Opinion No. 549 ignored evidence that the same loss estimates were systematically overstated. Opinion No. 549 concludes that all traders have a motive to manipulate if they are bonus eligible and ignores, *inter alia*, that it was mathematically impossible for BP to have benefited from the alleged intentional losses because of the complete lack of leverage in its trading positions.

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[4] Opinion No. 549 at P. 301.

[5] The "Pre-IP" or "Pre-IP Period" is January 2, 2008 through September 10, 2008. Opinion No. 549 P 21. The "IP" or "Investigative Period" is September 18, 2008 through November 30, 2008. *Id.* at P 2.

All these errors are compounded by Opinion No. 549's announcement that the Commission need not establish that any of the allegedly manipulative trades had any hallmark of manipulation, because they all were related to a presumed scheme. This cannot be reconciled with the requirements of reasoned decision-making. A confluence of irrelevancies cannot establish fraud.

On the issue of jurisdiction, Opinion No. 549 comprehensively fails to identify any allegedly manipulative transaction that falls within the Commission's jurisdiction under the Natural Gas Act (ignoring for the moment the direct conflict between 18 C.F.R. § 1c.1 and the blanket marketing certificate for sale for resale transactions issued pursuant to 18 C.F.R. § 284.402, which limits the scope of Commission regulation to subpart L of Part 284 of the Commission's regulations under the Natural Gas Act). Opinion No. 549 claims that the Commission need not make any showing that the allegedly manipulative trades were subject to the jurisdiction of the Commission; it is sufficient in the Commission's view to allege that intrastate trades had some effect on at least one jurisdictional transaction, no matter how small or unquantified, to warrant the Commission's intrusion into intrastate transportation and sales markets. The lost profit and harm to the market calculations are not in any way limited to the alleged miniscule "jurisdictional harm" alleged by OE. Opinion No. 549 cannot be reconciled with controlling precedent. Moreover, particularly in light of Opinion No. 549's complete failure to identify any jurisdictional physical transactions related to the alleged manipulation, no market harm disgorgement calculation, including financial transactions, is warranted under the *Hunter v. FERC* decision.

Opinion No. 549's application of the Penalty Guidelines is also arbitrary, capricious, and contrary to law. Opinion No. 549 fails independently to justify applying the Penalty Guidelines in this case. Instead, it effectively treats the Penalty Guidelines as a binding regulation issued without notice and comment rulemaking (although Opinion No. 549 also denies this, without reasoned explanation). Notwithstanding OE's previous admissions that BP had an effective compliance program, Opinion No. 549 erroneously concludes that this determination (made after almost five years of investigation) was not an admission of a party opponent. In addition, this determination is wrong on the facts and disregards substantial record evidence. Similarly, Opinion No. 549 permits OE to renege on its prior finding that BP was entitled to self-reporting credit. Opinion No. 549 also announces (erroneously) that the Commission has the authority to interpret a federal court decree and a consent agreement under the Commodity Exchange Act ("CEA") applying a statute and Commodity Futures Trading Commission ("CFTC") regulations in effect prior to the enactment of the Dodd-Frank Act. Opinion No. 549 compounds this clear error by piercing the corporate veil (again in a manner completely inconsistent with prior Commission policy) to disregard the fact that none of the BP respondents in this case was even a party to the consent decree. Moreover, OE dropped the entity that was a party to that decree as a respondent in this case because it had no involvement whatsoever in this matter.

Opinion No. 549 errs in suggesting that the total number of violations at issue is somewhere between over 600 and "perhaps" more than 900. The "over 600" number assumes that every fixed price trade made at HSC during the investigative period was manipulative, even though no showing has been made to support that contention.

(Opinion No. 549 maintains that it is not necessary to do so, which is, BP respectfully submits, another plain error). Review of the record evidence upon which Opinion No. 549 relies shows that the additional transactions identified by OE witness Dr. Rosa M. Abrantes-Metz ("Abrantes-Metz") are a subset of the total number of fixed price sales (680) and are not additive.[6] Moreover, the suggestion that the Commission could impose a civil penalty of $716 million in this case cannot be reconciled with the statute. A penalty equal to 371 times the maximum estimated (intrastate) market harm and equal to 3,456 times the alleged unjust profit would not take into account "the nature and seriousness of the violation." Opinion No. 549 also errs by computing the amount of the civil penalty without limiting that penalty to wholesale market transactions or impacts, and by embedding and compounding numerous methodological and legal errors. Moreover, there is no basis for contending that the civil penalty must be at the maximum range because of the alleged impact on wholesale natural gas markets subject to the jurisdiction of the Commission where, as here, no such impact was alleged, proved, or quantified in any meaningful detail.

The very process by which the Commission reached its decision in Opinion No. 549 is unlawful because it violates the Administrative Procedure Act's ("APA") separation of functions requirement, section 554(d)(2). The APA's mandate is unambiguous and categorical with respect to any particular case or a factually related case:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate

[6] OE-129 at 150, Table 18.

> or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The Commission's separation of functions rule, 18 C.F.R. § 385.2202, violates section 554(d)(2). It unlawfully permits Commission investigators to participate and advise in the decision and agency review of the same case even if they were involved in the investigation.

Opinion No. 549 announces that its findings are "incontrovertible."[7] This too is error for the reasons stated below.

II. BACKGROUND AND PROCEDURAL HISTORY

The procedural history of this case is set forth in BP's Brief on Exceptions ("Brief on Exceptions" or "BOE") (which is incorporated by reference for this purpose) and in Opinion No. 549.

III. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

A. Statement of Issues.[8]

Pursuant to Rule 713(c)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(2), BP provides the following Statement of Issues.

1. Whether Opinion No. 549 and the ID improperly shifted the burden of proof to BP and whether Opinion No. 549's affirmance of the ID on this issue constitutes reasoned decisionmaking that is supported by substantial record evidence, is not arbitrary and capricious, and is otherwise in accordance with law. 5 U.S.C. § 556; 15 U.S.C. § 717c-1 (2016); 18 C.F.R. § 1c.1 (2016); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Am. Grain Trimmers, Inc. v. Office of Workers' Comp. Programs*, 181 F.3d 810 (7th Cir. 1999); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck*

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[7] *See* Opinion No. 549 at P 192.

[8] BP's position on each issue is set forth in the Specification of Errors.

Lines, Inc. v. United States, 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

2. Whether Opinion No. 549 and the ID failed to articulate or apply the proper standard for assessing whether BP rebutted OE's prima facie case and whether Opinion No. 549's affirmance of the ID on this issue constitutes reasoned decisionmaking that is supported by substantial record evidence, is not arbitrary and capricious, and is otherwise in accordance with law. 5 U.S.C. § 556(d); 15 U.S.C. § 717c-1 (2012); 18 C.F.R. § 1c.1 (2016); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Am. Grain Trimmers, Inc. v. Office of Workers' Comp. Programs*, 181 F.3d 810 (7th Cir. 1999); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

3. Whether Opinion No. 549 and the ID improperly presumed rather than proved BP's liability, and whether Opinion No. 549's affirmance of the ID on this issue constitutes reasoned decisionmaking that is supported by substantial record evidence, is not arbitrary and capricious, and is otherwise in accordance with law. 5 U.S.C. § 556(d); 15 U.S.C. § 717c-1 (2012); 18 C.F.R. § 1c.1 (2016); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Am. Grain Trimmers, Inc. v. Office of Workers' Comp. Programs*, 181 F.3d 810 (7th Cir. 1999); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

4. Whether Opinion No. 549 satisfies the requirements of reasoned decisionmaking, is supported by substantial record evidence, is not arbitrary and capricious, and is otherwise in accordance with law, including but not limited to whether the opinion meets minimum requirements for deliberation, transparency, rationality, and logical consistency and evidentiary propriety applicable to reasoned decisionmaking. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015); *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163 (D.C. Cir. 2014); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014); *Rep. Airline Inc. v. U.S. Dep't of Transp.*, 669 F.3d 296 (D.C. Cir. 2012); *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *Tripoli Rocketry Ass'n v. ATF*,

437 F.3d 75 (D.C. Cir. 2006); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889 (D.C. Cir. 1998); *Be-Lo Stores v. N.L.R.B.*, 126 F.3d 268 (4th Cir. 1997); *J.C. Penney Co., Inc. v. N.L.R.B.*, 123 F.3d 988 (7th Cir. 1997); *Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893 (D.C. Cir. 1995); *Select Specialty Hospital v. Burwell*, 757 F.3d 308, (D.C. Cir. 1994); *New Orleans v. SEC*, 969 F.2d 1163 (D.C. Cir. 1992); *Rockwell Int'l Corp. v. N.L.R.B.*, 814 F.2d 1530 (11th Cir.1987); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir.1982); *Assoc. Gas Distribs. v. FERC*, 893 F.2d 349 (D.C. Cir. 1989); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983); *Mich. Wis. Pipe Line Co. v. FPC*, 520 F.2d 84 (D.C. Cir. 1975); *Sierra Club v. Salazar*, No. 10-1513, __ F. Supp. 3d ____ 2016 WL 1436645 (D.D.C. Apr. 11, 2016) (notice of appeal filed June 13, 2016 as Case No. 16-5168).

5. Whether Opinion No. 549 and the ID erred in applying a "confluence of factors" standard to determine BP's liability that satisfies the requirements of due process, and whether in doing so described what combination of factors could constitute a violation of law, and whether Opinion No. 549's affirmance of the ID on this issue constitutes reasoned decisionmaking that is supported by substantial record evidence, is not arbitrary and capricious, and is otherwise in accordance with law. U.S. CONST. amend. V; 5 U.S.C. § 556(d); 15 U.S.C. § 717c-1 (2016); 18 C.F.R. § 1c.1 (2016); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

6. Whether the ID and Opinion No. 549 erred by emphasizing and de-emphasizing particular factors within the alleged confluence of factors and ignored BP's arguments regarding the factors without reasoned decisionmaking and in an arbitrary and capricious manner that is contrary to law and due process. U.S. CONST. amend. V; 5 U.S.C. § 556(d); 15 U.S.C. § 717c-1 (2016); 18 C.F.R. § 1c.1 (2016); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

7. Whether the ID and Opinion No. 549 erred in accepting and approving Abrantes-Metz's analyses for purposes of establishing both an intent to manipulate and actual manipulation—including but not limited to her next-day fixed price sales analysis, timing analysis of sales and purchases at HSC, transport regression analysis and conclusions regarding alleged uneconomic use of Houston Pipeline,

inter-market analysis, distance analysis, and her bid-hitting analysis—and whether Opinion No. 549's affirmance of the ID with respect to her analyses constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. 5 U.S.C. § 556(d); 15 U.S.C. § 717c-1 (2016); 18 C.F.R. § 1c.1 (2016); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

8. Whether the ID and Opinion No. 549 erred in approving Abrantes-Metz's Pre-IP period—for reasons including but not limited to that Abrantes-Metz's analysis failed to meet basic requirements for statistical analysis, did not consider the effects of seasonality, and rejected and otherwise did not account for record evidence of the flaws in the selection of the period—and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

9. Whether the ID and Opinion No. 549 erred in rejecting BP's evidence of alternative non-manipulative explanations—including but not limited to the 2008 financial crisis and subsequent credit issues, Hurricanes Ike and Gustav and the manner in which these and other events affected the Texas Team's trading—and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

10. Whether the ID and Opinion No. 549 erred in affording Matthew A. Evans' ("Evans") testimony no weight and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *Burlington Truck Lines*, 371 U.S. 156, 167–68(1962); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Chao v. Gunite Corporation*, 442 F.3d 550, 559 (7th Cir. 2006); *Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992); 4 ADMIN. L. & PRAC. § 11:24 (3d ed.); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11

(D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

11. Whether the ID and Opinion No. 549 erred in accepting OE's expert testimony regarding other individuals' intent and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *U.S. v. Bennett*, 161 F.3d 171, 183 (3rd Cir. 1998); *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998); *Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997); *Kruszka v. Novartis Pharm. Corp.*, 28 F. Supp. 3d 920, 931 (D. Minn. 2014); *Siring v. Or. Board of Higher Educ.*, 927 F. Supp. 2d 1069, 1077-78 (D. Or. 2013); *In re Fosamax Products Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009); *In re Rezulin Products Liab. Litig.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004); *see also Johnson v. Wyeth LLC*, 2012 WL 1204081 (D. Ariz. 2012); *Baldonado v. Wyeth*, 2012 WL 1802066, (N.D. Ill. 2012); *U.S. Gypsum Co. v. Lafarge North America Inc.*, 670 F. Supp. 2d 768, 775 (N.D. Ill. 2009); *Smith v. Wyeth-Ayerst Laboratories Co.*, 279 F. Supp. 2d 684, 700 (W.D.N.C. 2003); *see Burlington Truck Lines*, 371 U.S. 156 (1962); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Chao v. Gunite Corporation*, 442 F.3d 550, 559 (7th Cir. 2006); *Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992); 4 ADMIN. L. & PRAC. § 11:24 (3d ed.); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

12. Whether the ID and Opinion No. 549 failed meaningfully to consider the relative experience of BP's witnesses and OE's witnesses and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *Burlington Truck Lines*, 371 U.S. 156, 167–68(1962); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Chao v. Gunite Corporation*, 442 F.3d 550, 559 (7th Cir. 2006); *Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992); 4 ADMIN. L. & PRAC. § 11:24 (3d ed.); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

13. Whether the ID and Opinion No. 549 erred in improperly inferring manipulative intent, including but not limited to improper reliance on secondary or derivative inferences of intent, and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *U.S. v. Bennett*, 161 F.3d 171, 183 (3rd Cir. 1998); *DePaepe v.*

General Motors Corp., 141 F.3d 715, 720 (7th Cir. 1998); *Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997); *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742 (D.C. Cir. 1988); *Kruszka v. Novartis Pharm. Corp.*, 28 F. Supp. 3d 920, 931 (D. Minn. 2014); *Siring v. Oregon Board of Higher Educ.*, 927 F. Supp. 2d 1069, 1077-78 (D. Or. 2013); *In re Fosamax Products Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009); *In re Rezulin Products Liab. Litig.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004); *see also Johnson v. Wyeth LLC*, 2012 WL 1204081 (D. Ariz. 2012); *Baldonado v. Wyeth*, 2012 WL 1802066, (N.D. Ill. 2012); *U.S. Gypsum Co. v. Lafarge North America Inc.*, 670 F. Supp. 2d 768, 775 (N.D. Ill. 2009); *Smith v. Wyeth-Ayerst Laboratories Co.*, 279 F. Supp. 2d 684, 700 (W.D.N.C. 2003); *see Burlington Truck Lines*, 371 U.S. 156, 167–68(1962); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Chao v. Gunite Corporation*, 442 F.3d 550, 559 (7th Cir. 2006); *Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992); 4 ADMIN. L. & PRAC. § 11:24 (3d ed.); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

14. Whether the ID and Opinion No. 549 erred in finding intent to manipulate based on the claim that BP's next-day physical gas trading was unprofitable as compared to the Pre-IP Period and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

15. Whether the ID and Opinion No. 549 erred in applying a "consciousness of guilt" theory to BP's conduct in this case and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *United States v. Marfo*, 572 Fed. Appx. 215 (4th Cir. 2014), *cert. denied*, 135 S.Ct. 468 (2014); *Maldonado v. Olander*, 108 Fed. Appx. 708, 712 (3d Cir. 2004), *cert. denied*, 544 U.S. 908 (2005); *United States v. Littlefield*, 840 F.2d 143, 148 (1st Cir. 1988), *cert. denied*, 488 U.S. 860 (1988); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

16. Whether Opinion No. 549 established jurisdiction in this case based on sales made by third parties that reference to the HSC *Gas Daily* index and whether

Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. NGA § 1(b), 15 U.S.C. § 717(b); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016); *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947); *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013); *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011); *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996); *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (2006); *Nat'l Ass'n of Gas Consumers v. All Sellers of Natural Gas in the U.S. in Interstate Commerce*, 106 FERC ¶ 61,072 (2004); *Transwestern Pipeline Co.*, 19 FERC ¶ 61,191 (1982), *reh'g denied*, 20 FERC ¶ 61,327 (1982), *pet. dismissed*, 747 F.2d 781 (D.C. Cir. 1984); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

17. Whether Opinion No. 549 established jurisdiction in this case based on "cash out" transactions made by an interstate pipeline that incorporated as one element HSC Gas Daily index prices and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. NGA § 1(b), 15 U.S.C. § 717(b); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016); *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947); *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013); *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011); *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996); *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, 114 FERC ¶ 61,047 (2006); *Nat'l Ass'n of Gas Consumers v. All Sellers of Natural Gas in the U.S. in Interstate Commerce*, 106 FERC ¶ 61,072 (2004); *Transwestern Pipeline Co.*, 19 FERC ¶ 61,191 (1982), *reh'g denied*, 20 FERC ¶ 61,327 (1982), *pet. dismissed*, 747 F.2d 781 (D.C. Cir. 1984)); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

18. Whether Opinion No. 549 established jurisdiction in this case based on the 52 examples of BP's sales in Patrick J. Bergin's ("Bergin") testimony and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. NGPA §§ 311 & 601, 15 U.S.C. §§ 3371 & 3431; 18 C.F.R. § 284.102 (2016); *City of Farmington, N.M. v. FERC*, 820 F.2d 1308 (D.C. Cir. 1987); *In re Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 (2004); *Utah Power & Light Co.*, 45

FERC ¶ 61,095, 61,296 (1988), *order on reh'g*, 47 FERC ¶ 61,209 (1989), *order on reh'g*, 48 FERC ¶ 61,035 (1989), *aff'd in part and remanded in part sub nom.*, *Envtl. Action, Inc, v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991); *Westar Transmission Co.*, 43 FERC ¶ 61,050 (1988); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

19. Whether Opinion No. 549's assertion of jurisdiction in this case based on the 52 examples of BP's sales in Bergin's testimony is supported by substantial evidence and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. NGPA §§ 311 & 601, 15 U.S.C. §§ 3371 & 3431; 18 C.F.R. § 284.102 (2016); *City of Farmington, N.M. v. FERC*, 820 F.2d 1308 (D.C. Cir. 1987); *In re Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 (2004); *Utah Power & Light Co.*, 45 FERC ¶ 61,095, 61,296 (1988), *order on reh'g*, 47 FERC ¶ 61,209 (1989), *order on reh'g*, 48 FERC ¶ 61,035 (1989), *aff'd in part and remanded in part sub nom.*, *Envtl. Action, Inc, v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991); *Westar Transmission Co.*, 43 FERC ¶ 61,050 (1988); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

20. Whether Opinion No. 549 established, by tracing gas through the HSC pool, that Bergin's examples of BP's sales constitute sales for resale in interstate commerce and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. NGPA §§ 311 & 601, 15 U.S.C. §§ 3371 & 3431; 18 C.F.R. § 284.102 (2016); *City of Farmington, N.M. v. FERC*, 820 F.2d 1308 (D.C. Cir. 1987); *In re Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 (2004); *Utah Power & Light Co.*, 45 FERC ¶ 61,095, 61,296 (1988) *order on reh'g*, 47 FERC ¶ 61,209 (1989), *order on reh'g*, 48 FERC ¶ 61,035 (1989), *aff'd in part and remanded in part sub nom.*, *Envtl. Action, Inc, v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991); *Westar Transmission Co.*, 43 FERC ¶ 61,050 (1988); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

21. Whether there is substantial evidence to support a finding of manipulation using Bergin's 52 examples of BP's sales and whether Opinion No. 549's affirmance of

the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. NGPA §§ 311 & 601, 15 U.S.C. §§ 3371 & 3431; 18 C.F.R. § 284.102 (2016); *City of Farmington, N.M. v. FERC*, 820 F.2d 1308 (D.C. Cir. 1987); *In re Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 (2004); *Utah Power & Light Co.*, 45 FERC ¶ 61,095 (1988); *order on reh'g*, 47 FERC ¶ 61,209 (1989), *order on reh'g*, 48 FERC ¶ 61,035 (1989), *aff'd in part and remanded in part sub nom.*, *Envtl. Action, Inc, v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991); *Westar Transmission Co.*, 43 FERC ¶ 61,050 (1988); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

22. Whether, to establish jurisdiction in this case, the admission of 50 of the 52 examples of BP sales in Bergin's rebuttal testimony was permissible and proper and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *S. California Edison Co.*, 50 FERC ¶ 63,012 (1990). *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

23. Whether the exercise of jurisdiction and the application of 18 C.F.R. § 1c.1 in this case is inconsistent with the blanket certificate provided in 18 C.F.R. § 284.402 and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. 18 C.F.R § 284.204; *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

24. Whether Opinion No. 549 erred in finding that the matter involved at least 48 violations by disregarding BP's arguments rebutting this figure and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is supported by substantial evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

25. Whether Opinion No. 549 erred in disregarding BP's arguments about the ID's adoption of OE's findings on the number of violations, estimate of market loss and net profits, and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

26. Whether Opinion No. 549 erred in affirming the ID's incorrect finding that the 680 fixed-price sales at HSC furthered the manipulative scheme, whether Opinion No. 549 improperly disregarded BP's argument that neither the Commission nor the NGA prohibit making fixed-price sales, selling at the beginning of a trading session, or selling via offer-initiated transactions, and whether Opinion No. 549's affirmance of the ID with respect to these issues constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

27. Whether Opinion No. 549 erred in concurring with the ID's finding that BP could be liable for violations on days where OE did not allege jurisdiction and in disregarding BP's arguments that only 24 trade days out of Bergin's 52 examples of sales for resale were covered by the IP, and that the ID incorrectly assumed that the four acts that Abrantes-Metz quantified were all jurisdictional transactions, and whether Opinion No. 549's affirmance of the ID with respect to these issues constituted reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

28. Whether Opinion No. 549 and the ID improperly disregarded BP's arguments that trades claimed to be manipulative lacked characteristics of the alleged manipulation scheme and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*,

54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

29. Whether Opinion No. 549 erred in concurring with the ID's findings on the estimate of loss and whether Opinion No. 549's disregard of BP's arguments rebutting OE's estimates lacked reasoned decisionmaking. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

30. Whether Opinion No. 549 erred in adopting OE's estimate of gross profits because the Commission lacks jurisdiction over the transactions at issue and BP did not engage in any trading that violated either the Commission's regulations or the NGA and, as a result, did not profit from market misconduct and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

31. Whether Opinion No. 549 erred in concluding without adequate explanation that OE adopted a reasonable approach to estimate gross profits and improperly disregarded BP's arguments to the contrary and determined without support that once OE has established that disgorgement is "a reasonable approximation causally connected to the violation," then the burden shifted to BP to demonstrate that OE's estimate "was not in fact reliable, and that BP's alternative approach was reasonable" and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

32. Whether Opinion No. 549 improperly determined that because OE's approach to gross profits was reasonable, the Commission did not need to address the three alternative methodologies provided by BP and whether Opinion No. 549's affirmance of the ID's rejection of the alternative methodologies constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir.

2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

33. Whether Opinion No. 549 wrongly concluded that OE reasonably calculated gross profits of between $233,330 and $316,170 and net gains of between $165,749 and $248,589 and wrongly ordered, without reasoned decisionmaking, that BP disgorge $207,169. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

34. Whether Opinion No. 549 improperly affirmed the ID's finding that OE's disgorgement estimate was reasonable because the estimate was not transparent or internally consistent and whether Opinion No. 549 failed to address adequately BP's arguments identifying inherent flaws in the estimate and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

35. Whether Opinion No. 549 acted in a manner consistent with applicable law in treating the Revised Policy Statement on Penalty Guidelines as binding precedent. *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974).

36. Whether Opinion No. 549 erred in affirming the ID's finding that three prior settlements should be treated as adjudications and whether Opinion No. 549's finding was arbitrary, capricious, and an abuse of discretion because it was based entirely on the Penalty Guidelines and applied the guidelines as carrying the force of law, contradicted federal precedent and language in Commission settlement orders, and lacked reasoned decisionmaking because it failed adequately to articulate support for treating the prior settlements as adjudications. 5 U.S.C. § 553; 15 U.S.C. § 717t-1(c); *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285 (2d Cir. 2014); *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266 (D.C. Cir. 1999); *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Pac. Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974); *Airport Comm'n of Forsyth County v. Civil Aeronautics Bd.*, 300 F.2d 185 (4th Cir. 1962); *Energy Transfer Partners L.P.*, 128 FERC ¶ 61,269 (2009); *Amaranth Advisors LLC*, 128 FERC ¶ 61,154 (2009); *Enron Power Marketing Inc.*, 122 FERC ¶ 61,015 (2008); *H. Bruce Cox*, 90 FERC ¶ 63,006 (2000); *Herbert D. Patrick*, 53 FERC ¶ 61,006 (1990); *Ozark Gas Transmission System*, 40 FERC ¶ 61,129 (1987); *Columbia Gas Transmission System Corp.*, 39 FERC ¶ 61,245 (1987); *Amoco Production Co.*, 35 FERC ¶ 61,375 (1986), *modifying*, 45 FERC ¶ 61,371 (1988); *Enforcement of Statutes, Regulations and Orders, Revised Policy Statement on*

Penalty Guidelines, 132 FERC ¶ 61,216 (2010); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

37. Whether Opinion No. 549 erred in affirming the ID's treatment of three settlements as adjudications because, inter alia: (1) the 2007 capacity release settlement involved unrelated conduct; (2) the Consent Order involved BP Products North America Inc., which is not a respondent in this proceeding, and Opinion No. 549 contradicted language in the order that it was a "settlement between the parties;" and (3) the Deferred Prosecution Agreement was dismissed by the U.S. Department of Justice. *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013); *CFTC v. BP Products North America Inc.*, Consent Order for Permanent Injunction and Other Relief, Dkt. No. 06-3503 (N.D. Ill. Oct. 25, 2007); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

38. Whether Opinion No. 549 erred in retroactively applying the revised Penalty Guidelines, issued on September 17, 2010, to settlements that were entered into in 2007 because the Penalty Guidelines significantly deviated from prior Commission policy by raising, for the first time, the possibility of treating settlements as adjudications and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266 (D.C. Cir. 1999); *Sierra Club v. Salazar*, No. 10-1513, ___ F. Supp. 3d ___, 2016 WL 1436645 (D.D.C. Apr. 11, 2016) (notice of appeal filed June 13, 2016 as Case No. 16-5168); *S. Jersey Gas Co. S. Jersey Res. Grp., LLC*, 132 FERC ¶ 61,266 (Sept. 27, 2010); *RRI Energy, Inc. RRI Energy Wholesale Generation, LLC*, 132 FERC ¶ 61,267 (Sept. 27, 2010); *Enforcement of Statutes, Regulations and Orders, Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010); *Enforcement of Statutes, Regulations and Orders*, *Revised Policy Statement on Enforcements*, 123 FERC ¶ 61,156 (2008); *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982); *Midwest Independent Sys. Operator, Inc.,* 116 FERC ¶ 63,030 (2006), *reversed on other grounds*, 31 FERC ¶ 61,173 (2010); *William Valentine and Sons, Inc.*, 46 FERC ¶ 61,252 (1989).

39. Whether Opinion No. 549 erred in piercing the corporate veil to treat settlements involving other entities as settlements entered into by the BP Respondents and whether Opinion No. 549's affirmance of the ID's finding lacked reasoned decisionmaking because it disregarded BP's arguments that BPPNA is not a BP Respondent. *See, e.g.*, *William Valentine and Sons, Inc.*, 46 FERC ¶ 61,252 (1989); *Midwest Independent Sys. Operator, Inc.*, 116 FERC ¶ 63,030 (2006), *reversed on other grounds* 131 FERC ¶61,173 (2010); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

40. Whether Opinion No. 549 erred in disregarding BP's corporate structure for purposes of prior adjudication because it directly contradicted the Commission's express language of its Penalty Guidelines and whether Opinion No. 549 did not engage in reasoned decisionmaking because it failed to explain its departure. *See, e.g.*, *Enforcement of Statutes, Regulations and Orders, Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010); *Sierra Club v. Salazar*, No. 10-1513, __ F. Supp. 3d ____ 2016 WL 1436645 (D.D.C. Apr. 11, 2016) (notice of appeal filed June 13, 2016 as Case No. 16-5168); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

41. Whether Opinion No. 549 erred in concurring with the ID's finding that BP's alleged conduct violated a CFTC injunction issued against BPPNA in 2007 and whether Opinion No. 549 failed to engage in reasoned decisionmaking by mischaracterizing and ignoring language in the Consent Order and concluding that it was unnecessary to find that the purported conduct violated the CEA in order to find that BP violated the injunction. *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

42. Whether Opinion No. 549 erred in ignoring OE's statements that BP's compliance program "reflected applicable industry practices," BP "provided the compliance program with sufficient resources," "BP had an effective compliance program," and "BP did have a significant compliance program" and whether Opinion No. 549 wrongly ignored BP's arguments on this issue and the fact that OE previously gave BP credit for self-reporting and whether Opinion No. 549's affirmance with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. Fed. R. Evid. 801(d)(2); *Jewel v. CSX*

Transp., Inc., 135 F.3d 361 (6th Cir. 1998); *Policy Statement on Compliance*, 125 FERC ¶ 61,058 (2008); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

43. Whether Opinion No. 549 erred in concurring with the ID's application of an irrational and unsupported standard for assessing BP's internal standards and procedures to prevent and detect violations and whether Opinion No. 549 wrongly affirmed the ID's disregard of substantial record evidence establishing BP's strong internal standards and procedures and whether Opinion No. 549's affirmance with respect to this issue constitutes reasoned decisionmaking that is not arbitrary and capricious or otherwise contrary to law. *Enforcement of Statutes, Regulations and Orders, Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010); *Policy Statement on Compliance*, 125 FERC ¶ 61,058, P 1 (2008); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

44. Whether Opinion No. 549 erred in affirming the ID's conclusion that BP lacked effective high-level management oversight of internal compliance and whether this conclusion failed to reflect reasoned decisionmaking because it was based on three examples lacking any connection to Factor 2. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983)*; Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962)*; Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

45. Whether Opinion No. 549 wrongly concurred with the ID's conclusion that BP "failed to make reasonable efforts to screen out 'bad actors'" and whether this finding improperly disregarded record evidence to the contrary and was based solely on the fact that no evidence suggested BP followed up on Comfort's flagged trading on October 21, 2008 and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is supported by substantial evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

46. Whether Opinion No. 549 erred in affirming the ID's conclusion that BP's communication and training efforts were deficient and whether this conclusion is contradicted by record evidence and reflects reasoned decisionmaking that is supported by substantial evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

47. Whether Opinion No. 549 incorrectly affirmed the ID's finding that BP failed to take reasonable steps to evaluate program effectiveness, including confidential avenues for employees to report noncompliance and whether this finding reflects reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

48. Whether Opinion No. 549 erred in affirming the ID's finding that BP's bonus structure reflected a lack of compliance incentives and noncompliance sanctions and whether the finding improperly disregarded record evidence to the contrary and whether Opinion No. 549's affirmance of the ID with respect to this issue constitutes reasoned decisionmaking that is supported by substantial record evidence and is not arbitrary and capricious or otherwise contrary to law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

49. Whether Opinion No. 549 improperly accepted the ID's incorrect finding that BP failed to take reasonable steps following the November 5, 2008 phone call and that BP lacked an "adequate reason" for concluding its internal inquiry into the call and whether this finding lacked any reasonable explanation and disregarded contradictory record evidence. *Enforcement of Statutes, Orders, Rules and Regulations, Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (Oct. 20, 2005); *Enforcement of Statutes, Orders, Rules and Regulations, Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010). *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982);

50. Whether Opinion No. 549 erred in assessing a civil penalty of $20.16 million against BP contrary to law, and contrary to record evidence. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

51. Whether the Commission's separation of functions rule, 18 C.F.R. § 385.2202, violates the APA requirements, 5 U.S.C. § 554(d)(2), because, *inter alia*, the Commission permits those who participate in an investigation to participate in the Commission's final decision and, if so, whether Opinion No. 549's finding of liability must therefore be reversed or vacated. 5 U.S.C. § 554(d)(2); 15 U.S.C. § 717c-1 (2016); 18 C.F.R. §§ 1b *et seq.*, 1c.1 (2015); 18 C.F.R. § 385.209, 2201-2202 (2015); *Grolier Inc. v. FTC*, 615 F.2d 1215, 1219-20 (9th Cir. 1980); *Twigger v. Schultz*, 484 F.2d 856, 858-59 (3d Cir. 1973); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266-67 (D.C. Cir. 1962); *Columbia Research Corp. v. Schaffer*, 256 F.2d 677, 679 (2d Cir. 1958); *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 78 (2007); S.Rep. No. 572, 79th Cong., 1st Sess. 18 (1945), reprinted in Administrative Procedure Act Legislative History, 79th Congress 1944-46, at 204 (1946); H.R.Rep. No. 1980, 79th Cong., 1st Sess. 27 (1946); reprinted in Administrative Procedure Act Legislative History, 79th Congress 1944-46, at 262 (1946); Report of the Attorney General's Committee on Administrative Procedure 50 (1941), S.Doc. No. 8, 77th Cong., 1st Sess. 50 (1941); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974 (4th Cir. 1982).

B. Specification of Errors.

Pursuant to Rule 713(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(1) (2016), BP alleges the following errors in Opinion No. 549.

First, Opinion No. 549 and the ID improperly shifted the burden of proof to BP, and Opinion No. 549 as a result is not the product of reasoned decisionmaking and is not supported by substantial record evidence. Opinion No. 549 is arbitrary and capricious and is otherwise not in accordance with law.

Second, Opinion No. 549 and the ID failed to articulate or apply the proper standard for assessing whether BP rebutted OE's prima facie case because, *inter alia*,

Opinion No. 549 required BP to produce evidence that would disprove or outweigh OE's *prima facie* case. Opinion No. 549's affirmance of the ID on this issue is not the product of reasoned decisionmaking and is not supported by substantial record evidence. Opinion No. 549 is arbitrary and capricious and otherwise not in accordance with law.

Third, Opinion No. 549 and the ID improperly presumed rather than proved BP's liability, and the decision of Opinion No. 549 to affirm the ID on this issue does not constitute reasoned decisionmaking that is supported by substantial record evidence, is arbitrary and capricious, and is otherwise not in accordance with law.

Fourth, Opinion No. 549 is not supported by substantial record evidence, is arbitrary and capricious, and is otherwise not in accordance with law, and Opinion No. 549 fails adequately to meet the minimum requirements to satisfy reasoned decisionmaking, including for deliberation, transparency, rationality, logical consistency, and evidentiary propriety.

Fifth, Opinion No. 549 and the ID erred in applying a "confluence of factors" standard to determine BP's liability that does not satisfy the requirements of due process and erred in failing to state what combination of factors would constitute a violation of law. Opinion No. 549's affirmance of the ID with respect to each of these did not constitute reasoned decisionmaking that is supported by substantial record evidence, is arbitrary and capricious, and is otherwise not in accordance with law or due process.

Sixth, the ID and Opinion No. 549 erred by emphasizing and de-emphasizing particular factors within the alleged confluence of factors and ignoring BP's arguments regarding the factors without reasoned decisionmaking and in an arbitrary and capricious manner that is contrary to law.

Seventh, the ID and Opinion No. 549 erred in accepting and approving Abrantes-Metz's analyses for purposes of establishing both an intent to manipulate and actual manipulation—including but not limited to her next-day fixed-price sales analysis, timing analysis of sales and purchases at HSC, transport regression analysis and conclusions regarding alleged uneconomic use of Houston Pipeline ("HPL"), inter-market analysis, distance analysis, and her bid-hitting analysis—and Opinion No. 549's affirmance of the ID with respect to her analyses constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and otherwise contrary to law.

Eighth, the ID and Opinion No. 549 erred in approving Abrantes-Metz's Pre-IP period and Opinion No. 549's affirmance of the ID with respect to these issues—for reasons including but not limited to that Abrantes-Metz's analysis failed to meet basic requirements for statistical analysis, did not consider the effects of seasonality, and rejected and otherwise did not account for record evidence of the flaws in the selection of the period─constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Ninth, the ID and Opinion No. 549 erred in rejecting BP's evidence of alternative non-manipulative explanations—including but not limited to the 2008 financial crisis and subsequent credit issues, hurricanes Ike and Gustav and the manner in which these and other events affected the Texas Team's trading—and Opinion No. 549's affirmance of the ID with respect to these issues constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Tenth, the ID and Opinion No. 549 erred in affording Evans' testimony no weight, and Opinion No. 549's affirmance of the ID with respect to these issues

constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Eleventh, the ID and Opinion No. 549 erred in accepting OE's expert testimony regarding other individuals' intent, and Opinion No. 549's affirmance of the ID with respect to these issues constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Twelfth, the ID and Opinion No. 549 failed meaningfully to consider the relative experience of BP's witnesses and OE's witnesses, and Opinion No. 549's affirmance of the ID with respect to these issues constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Thirteenth, the ID and Opinion No. 549 erred in improperly inferring manipulative intent, including but not limited to improper reliance on secondary or derivative inferences of intent, and Opinion No. 549's affirmance of the ID with respect to these issues constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Fourteenth, Opinion No. 549 erred in finding intent to manipulate based on the claim that BP's next-day physical gas trading was unprofitable as compared to the Pre-IP period. Contrary to record evidence, Opinion No. 549 is in this respect unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Fifteenth, the ID and Opinion No. 549 erred in applying a "consciousness of guilt" theory to BP's conduct in this case, and Opinion No. 549's affirmance of the ID

with respect to this issue constituted unreasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Sixteenth, contrary to the NGA and precedent, Opinion No. 549 erred in claiming jurisdiction based on third party index sales and this constituted unreasoned decisionmaking that is arbitrary and capricious and otherwise contrary to law.

Seventeenth, Opinion No. 549 erred in asserting jurisdiction in this case based on cash out transactions on one interstate pipeline that used HSC *Gas Daily* prices as one input, contrary to the NGA and precedent and this constituted unreasoned decisionmaking that is arbitrary and capricious and otherwise contrary to law.

Eighteenth, Opinion No. 549 erred in finding jurisdiction based on the 52 "examples" of BP's sales in Bergin's testimony. In this respect, Opinion No. 549 is not the product of reasoned decisionmaking, is arbitrary and capricious, is not supported by substantial evidence, and is otherwise contrary to law.

Nineteenth, Opinion No. 549's assertion of jurisdiction in this case based on the 52 examples of BP's sales in Bergin's testimony is not supported by substantial evidence and Opinion No. 549's affirming of the ID constituted unreasoned decisionmaking that is arbitrary and capricious and otherwise contrary to law.

Twentieth, Opinion No. 549 errs in holding that Bergin's pathing examples of BP sales constitute sales for resale in interstate commerce. This element of the decision is not supported by substantial evidence and is not the product of reasoned decisionmaking and is arbitrary and capricious and is otherwise contrary to law.

Twenty-first, no substantial evidence supports the claim that any of Bergin's 52 examples of direct sales by BP were related to the manipulative scheme presumed but not

proved by OE, and Opinion No. 549's affirmance of the ID is not the product of reasoned decisionmaking and is arbitrary and capricious or otherwise contrary to law.

Twenty-second, the admission of 50 of 52 of the direct sales examples for the first time in Bergin's rebuttal testimony was impermissible "sandbagging" contrary to Commission precedent and fundamentally unfair and Opinion No. 549's affirmance of the ID is not the product of reasoned decisionmaking and is arbitrary and capricious or otherwise contrary to law.

Twenty-third, even if OE had established the existence of any jurisdictional transaction related to the alleged manipulation, exercise of jurisdiction under 18 C.F.R. § 1c.1 would be inconsistent with the blanket certificate provided in 18 C.F.R. § 284.402, and contrary to law.

Twenty-fourth, Opinion No. 549 erred in finding that the matter involved at least 48 violations because it wrongly disregarded BP's arguments to the contrary, and Opinion No. 549's affirmance of the ID on this issue is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Twenty-fifth, Opinion No. 549 erred in affirming the ID's adoption of OE's findings on the number of violations, estimate of market loss and net profits, contrary to record evidence. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Twenty-sixth, Opinion No. 549 erred in affirming the ID's incorrect finding that the 680 fixed-price sales at HSC furthered the manipulative scheme and improperly

disregarded BP's argument that neither the Commission nor the NGA prohibit making fixed-price sales, selling at the beginning of a trading session, or selling via offer-initiated transactions. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Twenty-seventh, Opinion No. 549 erred in concurring with the ID's finding that BP could be liable for violations on days where OE did not allege jurisdiction and in disregarding BP's arguments that only 24 trade days out of Bergin's 52 examples of sales for resale were covered by the IP. The ID incorrectly assumed that the four acts that Abrantes-Metz quantified were all jurisdictional transactions. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Twenty-eighth, Opinion No. 549 and the ID improperly disregarded BP's arguments that the trades claimed to be manipulative lacked characteristics of the alleged manipulation scheme. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Twenty-ninth, Opinion No. 549 erred in concurring with the ID's findings on the estimate of loss and Opinion No. 549's disregard of BP's arguments rebutting OE's estimates lacked reasoned decisionmaking. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Thirtieth, Opinion No. 549 erred in adopting OE's estimate of gross profits because the Commission lacks jurisdiction over the transactions at issue and BP did not engage in any trading that violated either the Commission's regulations or the NGA and, as a result, did not profit from alleged market misconduct. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Thirty-first, Opinion No. 549 erred in concluding without adequate explanation that OE adopted a reasonable approach to estimate gross profits and improperly disregarded BP's arguments to the contrary and determined without support that once OE has established that disgorgement is "a reasonable approximation causally connected to the violation," the burden shifted to BP to demonstrate that OE's estimate "was not in fact reliable, and that BP's alternative approach was reasonable." As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Thirty-second, Opinion No. 549 improperly determined that because OE's approach to gross profits was reasonable, the Commission did not need to address the three alternative methodologies provided by BP. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Thirty-third, Opinion No. 549 wrongly concluded that OE reasonably calculated gross profits of between $233,330 and $316,170 and net gains of between $165,749 and $248,589, wrongly ordered BP to disgorge $207,169, and failed to engage in reasoned decisionmaking because it accepted the accuracy of these figures without further

explanation and it disregarded the record evidence and BP's arguments without adequate justification.

Thirty-fourth, Opinion No. 549 improperly affirmed the ID's finding that OE's disgorgement estimate was reasonable because the estimate was not transparent or internally consistent, and Opinion No. 549 failed adequately to address BP's arguments identifying inherent flaws in the estimate. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Thirty-fifth, Opinion No. 549 is contrary to law in that it treats the Revised Policy Statement on Penalty Guidelines as binding precedent – adopted without the protections of notice and comment rulemaking.

Thirty-sixth, Opinion No. 549 erred in affirming the ID's finding that three prior settlements should be treated as adjudications, and Opinion No. 549's finding was arbitrary, capricious, and an abuse of discretion because it was based entirely on the Penalty Guidelines and applied the guidelines as carrying the force of law, contradicted federal precedent and language in Commission settlement orders, and lacked reasoned decisionmaking because it failed adequately to articulate support for treating the prior settlements as adjudications.

Thirty-seventh, Opinion No. 549 erred in affirming the ID's treatment of three settlements as adjudications because, inter alia: (1) the 2007 capacity release settlement involved unrelated conduct; (2) the Consent Order involved BP Products North America Inc., which is not a respondent in this proceeding, and Opinion No. 549 contradicted language in the order that it was a "settlement between the parties;" and (3) the Deferred

Prosecution Agreement was dismissed by the U.S. Department of Justice. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Thirty-eighth, Opinion No. 549 erred in retroactively applying the revised Penalty Guidelines, issued on September 17, 2010, to settlements that were entered into in 2007 because the Penalty Guidelines significantly deviated from prior Commission policy by raising, for the first time, the possibility of treating settlements as adjudications. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Thirty-ninth, Opinion No. 549 erred in piercing the corporate veil to treat settlements involving other entities as settlements entered into by the BP Respondents, and Opinion No. 549's affirmance of the ID's finding lacked reasoned decisionmaking because it disregarded without explanation BP's arguments that BPPNA is not a BP Respondent.

Fortieth, Opinion No. 549 erred in disregarding BP's corporate structure for purposes of prior adjudication because it directly contradicted the Commission's express language in the commentary section of its Penalty Guidelines, and Opinion No. 549 did not engage in reasoned decisionmaking because it failed to explain its departure.

Forty-first, Opinion No. 549 erred in concurring with the ID's finding that BP's alleged conduct violated a CFTC injunction issued against BPPNA in 2007, and Opinion No. 549 failed to engage in reasoned decisionmaking by mischaracterizing and ignoring language in the Consent Order and concluding that it was unnecessary to find that the purported conduct violated the CEA in order to find that it violated the injunction.

Forty-second, Opinion No. 549 erred in ignoring OE's statements that BP's compliance program "reflected applicable industry practices," BP "provided the compliance program with sufficient resources," "BP had an effective compliance program," and "BP did have a significant compliance program," and Opinion No. 549 wrongly ignored BP's arguments to the contrary and the fact that OE previously gave BP credit for self-reporting. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Forty-third, Opinion No. 549 erred in concurring with the ID's application of an irrational and unsupported standard for assessing BP's internal standards and procedures to prevent and detect violations, and Opinion No. 549 wrongly affirmed the ID's disregard of substantial record evidence establishing BP's strong internal standards and procedures. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Forty-fourth, Opinion No. 549 erred in affirming the ID's conclusion that BP lacked effective high-level management oversight of internal compliance and this conclusion failed to reflect reasoned decisionmaking because it was based on three examples lacking any connection to Factor 2.

Forty-fifth, Opinion No. 549 wrongly concurred with the ID's conclusion that BP "failed to make reasonable efforts to screen out 'bad actors'" and whether this finding improperly disregarded record evidence to the contrary and was based solely on the fact that no evidence suggested BP followed up on Comfort's flagged trading on October 21,

2008. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Forty-sixth, Opinion No. 549 erred in affirming the ID's conclusion that BP's communication and training efforts were deficient and this conclusion is contradicted by record evidence and reflects unreasoned decisionmaking.

Forty-seventh, Opinion No. 549 incorrectly affirmed the ID's finding that BP failed to take reasonable steps to evaluate program effectiveness, including confidential avenues for employees to report noncompliance, and this finding reflects unreasoned decisionmaking because it is contradicted by substantial record evidence.

Forty-eighth, Opinion No. 549 erred in affirming the ID's finding that BP's bonus structure reflected a lack of compliance incentives and noncompliance sanctions and the finding improperly disregarded record evidence to the contrary.

Forty-ninth, Opinion No. 549 improperly concurred with the ID's incorrect finding that BP failed to take reasonable steps following the November 5, 2008 phone call and that BP lacked an "adequate reason" for concluding its internal inquiry into the call. As a result, Opinion No. 549 is not supported by substantial evidence, is not the product of reasoned decisionmaking, and is arbitrary and capricious and otherwise contrary to law.

Fiftieth, Opinion No. 549 erred in assessing a civil penalty of $20.16 million against BP contrary to law, and contrary to record evidence.

Fifty-first, the Commission's separation of functions rule, 18 C.F.R. § 385.2202, violates the APA, including the APA's separation of function requirements, 5 U.S.C. §

554(d), because the Commission permits an investigator of a company to participate in the Commission's final decision. Accordingly, Opinion No. 549's finding of liability must therefore be reversed or vacated because the very process by which the decision was reached is unfair, unlawful, and a direct violation of the APA.

IV. ARGUMENT

A. Opinion No. 549 Improperly Shifted the Burden of Proof to BP.

Opinion No. 549 shifted the burden of proof to BP by presuming BP's liability and requiring BP to produce evidence that "outweigh[ed]" OE's evidence in order to "disprove" OE's case. In the sections below, BP explains that this fundamental error pervades all aspects of Opinion No. 549. Even if Opinion No. 549 had not shifted the burden of proof to BP, the findings made in Opinion No. 549 on each of the material issues in this case are not supported by substantial evidence and are not the product of reasoned decisionmaking.

When reviewing an Initial Decision, FERC must reach a well-reasoned and independent judgment supported by substantial evidence in the record. Opinion No. 549 failed this test.

The ID and Opinion No. 549 failed to apply properly the Supreme Court's three-step analytical framework for administrative proceedings to determine whether OE met its burden of proof. Instead, Opinion No. 549 and the ID applied a flawed two-step alternative that improperly shifted the burden of proof to BP throughout the entire proceeding. Opinion No. 549's and the ID's approach is therefore arbitrary and capricious and not in accordance with law.

The Supreme Court's three-step analytical framework involves a burden of proof (*i.e.*, a burden of persuasion) that at all times resides with the proponent (here OE).[9] The three-step framework properly proceeds as follows: (1) the petitioner makes a *prima facie* case for the respondent's liability; (2) the respondent bears the burden to produce some evidence that, "taken as true," rebuts any element of the *prima facie* case; and (3) the rebuttal having been made, the presumption drops from the case and the ALJ weighs the competing evidence in the correct context, absent a presumption of liability, and decides whether the petitioner met its burden of proof.[10]

The three-step framework is a common analytical approach to resolving adjudications under the APA. Comparing the precedent under the APA (as well as in compensation claims and employment discrimination disputes), the Seventh Circuit held that

> "[a]t least in terms of the way the responsibilities of the litigants develop over the course of the proceeding (as opposed to the specific requirements imposed by this statute on the evidence the employer must produce), this

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[9] *Greenwich Collieries*, 512 U.S. at 269-71; *see also* Opinion No. 549 at P 59. Opinion No. 549 acknowledged that OE at all times should have borne the burden of proof. However, Opinion No. 549's citation to *National Mining* is inapposite. Opinion No. 549 at P 59 (citing *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002)). There, the D.C. Circuit reached the inapposite holding that the regulation at issue did not shift the burden of proof with regard to the proponent of a remedial order because the regulation applied only after liability had already been assessed. *Nat'l Mining*, 292 F.3d at 871-72 (explaining that "[t]he regulation, however, shifts the burden of proof only to the 'designated responsible operator,' 20 C.F.R. § 725.495(c); i.e., it applies only to the extent that a claimant has already carried his burden of proving that an operator is liable. 'In seeking to be excused from liability,' the District Court explained, 'the operator becomes the 'proponent' of a remedial order of the ALJ and, therefore, the party to which [the APA] assigns the burden of proof.'"). *National Mining* therefore does not speak to the proper analysis by which to assess OE's case for BP's liability in the first instance.

[10] *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Greenwich Collieries*, 512 U.S. at 269-71.

> area is analogous to the familiar burden-shifting approach used in employment discrimination cases."[11]

Rather than applying the three-step analysis, the ID and Opinion No. 549 applied a flawed two-step analysis that improperly shifted the burden of proof to BP: (1) OE was required to make a *prima facie* showing of manipulation establishing a presumption of BP's liability, and (2) BP then was required to rebut OE's case by presenting evidence that would "defeat or otherwise outweigh" the prima facie showing.[12] In the words of Opinion No. 549, "when the party with the burden of proof establishes a *prima facie* case supported by credible and credited evidence—as the ALJ found the evidence Enforcement Staff proffered at the hearing—then the burden of producing evidence to rebut, defeat or otherwise outweigh the evidence supporting a claim falls upon the opposing party."[13] This standard shifts the burden of proof to BP because it fails to assess properly whether BP rebutted the presumption that it is liable.

Opinion No. 549 did not deny that it and the ID presumed BP's liability, nor could it.[14] Opinion No. 549 repeatedly concluded that BP "***failed to disprove***" Staff's allegations.[15] Opinion No. 549 repeatedly stated that "***BP has not successfully rebutted***

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[11] *Am. Grain Trimmers, Inc. v. Office of Workers' Comp. Programs*, 181 F.3d 810, 816 (7th Cir. 1999) (citing, among other cases, *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). In *American Grain Trimmers*, section 20(a) of the Longshore and Harbor Workers' Compensation Act required the respondents to meet that statute's heavier burden of production. That statute and, consequently, the court's holding with respect to whether the burden of production in *American Grain Trimmers* is not pertinent in this case.

[12] Opinion No. 549 P 59.

[13] *Id.* at P 59 (citing *Greenwich Collieries*, 512 U.S. at 269-71); *see also* Garner, B., BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "prima facie case" as "[t]he establishment of a legally required rebuttable presumption.").

[14] Opinion No. 549 addressed the notion of a presumption in a confusing explanation that was not consistent with Supreme Court precedent: "Nor is the burden of production limited to rebutting or meeting a legal presumption, as BP suggests, but applies equally to rebutting or defeating a *prima facie* case on which Enforcement Staff bears the ultimate burden of persuasion." Opinion No. 549 at P 59.

[15] *See*, *e.g.*, Opinion No. 549 at P 179 (emphasis added).

Enforcement Staff's allegations . . . ."[16] And, ultimately, Opinion No. 549 concluded that BP did not "***defeat or otherwise outweigh***" OE's case.[17] Illustrations of the presumption of BP's liability and shift in the burden of proof pervade Opinion No. 549's reasoning:

- "[T]he ID found no credible or convincing evidence to support such business justification **to outweigh the inference of manipulation established by Enforcement Staff's evidence**;"[18]
- "**BP has not successfully rebutted Enforcement Staff's allegations** regarding any of the changes in BP's trading behavior during the Investigative Period that Enforcement Staff identified;" [19]
- "[T]he ID reasonably concluded that Abrantes-Metz's observed increase in market share fixed price sales and 'shift' in BP's trading toward fixed-price instruments at Houston Ship Channel during the Investigative Period was supported by the evidence, **which BP did not successfully rebut**;"[20]
- "[W]e find Evans' rebuttal analysis unpersuasive on this point;"[21]
- "We find that **BP did not rebut the fact** that it increased bid-hitting from the Pre-Investigative Period to the Investigative Period;"[22]
- "**BP does not rebut the fact** that the Texas Team's next-day physical gas trading was unprofitable during the Investigative Period but was profitable during the Pre-Investigative Period;"[23]
- "**[W]e find BP's individual pieces of rebuttal evidence to be unpersuasive**;"[24]

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16 *Id*. at P 71 (emphasis added).

17 *Id*. at P 59 (emphasis added).

18 *Id*. at P 52 (emphasis added).

19 *Id.* at P 71 (emphasis added).

20 *Id.* at P 83 (emphasis added).

21 *Id.* at P 91 (emphasis added).

22 *Id.* at P 124 (emphasis added).

23 *Id.* at P 131 (emphasis added).

24 *Id.* at P 166 (emphasis added).

- "**We find that the ID considered, and reasonably rejected, BP's evidence regarding the effects of the 2008 financial crisis and two hurricanes as insufficient to explain the Texas Team's change in trading behavior** during the Investigative Period;"[25]

- "**These, and other, examples of Evans failing to disprove Enforcement Staff's allegations support the ID's determination to afford Evans's testimony no weight . . . .**;"[26]

- "The ID's decision to **not afford Evans any weight** is further supported by Evans's **failure to disprove any of Enforcement Staff's allegations** with his testimony and evidence;"[27] and

- "The ID also found that **Evans failed to disprove Enforcement Staff's allegations in numerous other contexts**."[28]

The presumption imposed upon BP is evident throughout Opinion No. 549 and is contrary to 18 C.F.R. § 1.c.1 and Section 4A of the NGA.

The ID and Opinion No. 549 failed to apply the proper standard. Under the Supreme Court's framework, to defeat the presumption, the respondent need only produce evidence that, "taken as true," rebuts the *prima facie* case.[29] Contrary to the ID's and Opinion No. 549's erroneous approaches, the respondent's "burden is one of production, not persuasion; ***it 'can involve no credibility assessment***.'"[30] The "***burden-of-production determination necessarily precedes the credibility-assessment stage.***"[31] If the respondent meets its burden of producing sufficient evidence to rebut the *prima facie* case, "the presumption raised by the *prima facie* case is rebutted and drops from the

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[25] *Id.* at P 171 (emphasis added).

[26] *Id.* at P 180 (emphasis added).

[27] *Id.* at P 178 (emphasis added).

[28] *Id.* at P 179 (emphasis added).

[29] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

[30] *Reeves*, 530 U.S. at 142 (quoting *St. Mary's*) (emphasis added).

[31] *St. Mary's*, 509 U.S. at 509 (emphasis added). The ID and Opinion No. 549 used the words "burden of proof" and "burden of production" but failed to apply them correctly.

case."[32] Critically, this never happened under the ID's or Opinion No. 549's reasoning because each incorrectly required BP to "disprove" or "outweigh" Staff's *prima facie* case, rather than produce evidence that, "taken as true," rebuts any element of the *prima facie* case. ***Consequently, the ID and Opinion No. 549 presumed but did not prove BP's liability.*** That error pervaded all of their determinations and shifted the burden of proof to BP.

Only in step three, with the presumption of BP's liability no longer tainting the analysis, could the ID or Opinion No. 549 have properly weighed the evidence and made well-reasoned determinations regarding credibility. As the Supreme Court held in *St. Mary's* and *Reeves*, a clear separation between the analysis in steps two and three is necessary to avoid shifting the burden of proof.[33] This is consistent with the Court's holding in *Greenwich Collieries*, on which Opinion No. 549 relied.[34]

In *Greenwich Collieries*, the Supreme Court held that an administrative "true doubt rule" violated section 7(c) of the APA. The true doubt rule required that where the evidence submitted by a petitioner and respondent is evenly balanced, the petitioner prevails. The Court held that the rule violated the APA's requirement that the burden of proof (*i.e.*, persuasion) always apply to the petitioner.[35]

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[32] *St. Mary's*, 509 U.S. at 507 (quotations and citations omitted); *see also Am. Grain Trimmers*, 181 F.3d 810, 816 ("once the employer has met that burden of production, the Court held in *St. Mary's*, the presumption dissolves and the plaintiff is left with the ultimate burden of persuasion on the evidence as a whole, in keeping with FED. R. EVID. 301.").

[33] *St. Mary's*, 509 U.S. at 507-09; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000).

[34] Opinion No. 549 at P 59.

[35] *Greenwich Collieries*, 512 U.S. at 280.

The ID's and Opinion No. 549's two-step framework is inconsistent with *Greenwich Collieries'* rejection of the true doubt rule. Opinion No. 549 asserted that a respondent bears "the burden of producing evidence to rebut, defeat or otherwise outweigh" OE's *prima facie* case.[36] The precedent that Opinion No. 549 misapplied stated that a *prima facie* case must "either be rebutted or accepted as true."[37] A respondent who offers only equal evidence to a *prima facie* case cannot "outweigh" the *prima facie* case.[38] On equal evidence, the *prima facie* case therefore must be accepted as true under the ID and Opinion No. 549's approach. Consequently, the presumption unlawfully operated, like the true doubt rule, as a tie-breaker in favor of the petitioner. The operation of the ID's and Opinion No. 549's two-step framework was therefore inconsistent with the holding in *Greenwich Collieries*.[39]

In *St. Mary's*, the Court of Appeals reasoned that because "all of the defendants' proffered reasons were discredited," the defendants offered "no legitimate reason for their actions" and therefore "were in no better position than if they had remained silent."[40]

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[36] Opinion No. 549 at P 52, 59.

[37] *Greenwich Collieries*, 512 U.S. at 280.

[38] Opinion No. 549's citation to a Ninth Circuit case reviewing *de novo* a district court decision on a bankruptcy court's ruling on a creditor's claim is misplaced. Opinion No. 549 at P 59 (citing *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1040 (9th Cir. 2000)). Here, as in *St. Mary's*, *Reeves*, *Greenwich Collieries* and *American Grain Trimmers*, the issue is assessment of *liability* and benefits between parties, often the government. But even if *Lundell* applied in the present context (which it does not), it does not support the ID's and Opinion No. 549's position. The Ninth Circuit asserted in *Lundell* that the rebuttal evidence can be *even* with the *prima facie* case, it need not "outweigh" it as the Commission held here. *Compare Lundell*, 223 F.3d at 1040 (to rebut, evidence can be "equal" to the *prima facie* case) *with* Opinion No. 549 at P 59 (to rebut, evidence should "outweigh" the *prima facie* case). Moreover, the Ninth Circuit's assertion in the inapposite bankruptcy claim context that rebuttal evidence must equal the *prima facie* case to rebut it is at odds with the Supreme Court's approach in cases involving the apportionment of *liability* between parties, like in *Greenwich Collieries*, *St. Mary's* and *Reeves*, which we know from the Seventh Circuit to present analogous burden shifting approaches. *Am. Grain Trimmers, Inc. v. Office of Workers' Comp. Programs*, 181 F.3d 810, 816 (7th Cir. 1999).

[39] *Greenwich Collieries*, 512 U.S. at 280*; see also* Opinion No. 549 at PP 58-63.

[40] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

The Supreme Court reversed, criticizing this determination in ways applicable to the reasoning of Opinion No. 549.[41] Presuming BP's liability, Opinion No. 549 affirmed and adopted the ALJ's determination that "Evans[‘] testimony is not given any weight."[42] In other words, at least with respect to expert testimony, BP was in "no better position than had they remained silent."[43] The Supreme Court disagrees. Producing evidence to rebut the *prima facie* case and defeat the presumption of liability matters greatly. It frames the entirety of the analysis in terms of the petitioner's burden of proof rather than the respondent's burden of production. This is what the ID and Opinion No. 549 failed to do. "By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners [defendants below] sustained their burden of production, and thus placed themselves in a 'better position than if they had remained silent.'"[44] The ID and Opinion No. 549 irreparably erred by presuming BP's liability. The framework they applied shifted the burden of proof and tainted the fair consideration of the evidence. Opinion No. 549's and the ID's approach is therefore arbitrary and capricious and not in accordance with law.

This error was systemic and cannot be cured simply by finessing the articulation of the framework. Nor can it be cured by asserting that even if the ID and Opinion No. 549 properly segregated the reasoning between steps two and three, there would be no different result. The presumption of liability pervades the ID and Opinion No. 549.

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41 *Id*. at 509-10.

42 Opinion No. 549 at PP 61, 175 (brackets in original).

43 *St. Mary's*, 509 U.S. at 509

44 *Id.*

B. Opinion No. 549 Failed to Define Conduct that Violates the Anti-Manipulation Rule in a Reasoned Decision Supported by Substantial Evidence.

The APA requires that the Commission's decision not be arbitrary and capricious.[45] Arbitrary and capricious review "establishes a scheme of reasoned decisionmaking."[46] Reasoned decisionmaking requires that the Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[47] At least four guiding principles establish minimum criteria for reasoned decisionmaking, each of which Opinion No. 549 failed to meet: "deliberation, transparency, rationality, and evidentiary propriety."[48]

Deliberation. Opinion No. 549 must have meaningfully "engage[d] the arguments raised before it."[49] Opinion No. 549 is not adequately deliberative if it fails to "respond meaningfully to objections raised by a party."[50]

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[45] 5 U.S.C. § 706(2)(A); *Allentown Mack Sales and Serv., Inc. v. N.L.R.B.*, 552 U.S. 359, 375 (1998) ("*Allentown Mack*").

[46] *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) (internal quotation marks omitted); *see also Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983) (footnote, citation, and internal quotation marks omitted) (stating that, under arbitrary and capricious review, courts must "engage in a searching and careful inquiry, the keystone of which is to ensure that the [agency] engaged in reasoned decisionmaking") and disregarding meaningful alternatives without robust explanation constitutes an "artificial narrowing of options" that is "antithetical to reasoned decisionmaking and cannot be upheld.").

[47] *Tripoli Rocketry Ass'n v. ATF*, 437 F.3d 75, 81 (D.C. Cir. 2006) (citation and internal quotation marks omitted); *Sierra Club v. Salazar*, No. 10-1513, ___ F. Supp. 3d ____, 2016 WL 1436645, at *15-16 (D.D.C. Apr. 11, 2016) (notice of appeal filed June 13, 2016 as Case No. 16-5168).

[48] *Sierra Club v. Salazar*, 2016 WL 1436645, at *15.

[49] *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015) (citation and internal quotation marks omitted).

[50] *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014) (emphasis added) (citation and internal quotation marks omitted); *see Mich. Wis. Pipe Line Co. v. FPC*, 520 F.2d 84, 89 (D.C. Cir. 1975) (citations omitted) (stating that an agency's "bare application [of a rule] . . . without even so much as a passing comment upon the uncontradicted record evidence . . . simply is not reasoned decision-making"); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (2014) ("It is textbook administrative law that an

Transparency. Opinion No. 549 must "reveal the reasoning that underlies its conclusion."[51] Findings and rationales that are "unclear or contradictory" do not warrant deference.[52]

Rationality and Logical Consistency. The nature and substance of the agency's reasoning must be logically cohesive and coherent. Indeed, "[o]ne of the core tenets of reasoned decision-making is that 'an agency [when] changing its course . . . is obligated to supply a reasoned analysis for the change.'"[53] This applies both with respect to an agency's adherence to its precedent and also to the internal logic in an order.[54] An agency's reasoning is deficient if, for example, it is "based on speculation."[55]

Evidentiary Propriety. An agency's decision will be set aside where it is unsupported by "substantial evidence."[56] Beyond this threshold requirement, reasoned decisionmaking requires the agency to "examine the relevant data"[57] and precludes the agency from ignoring data or offering "'an explanation . . . that runs counter to the evidence before the agency.'"[58] As to credibility determinations, there must be a "logical

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agency must provide [] a reasoned explanation for departing from precedent or treating similar situations differently and Commission cases are no exception") (citations, brackets and quotations omitted); *see Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 893 (D.C. Cir. 1998) ("Because it has not adequately explained its decision to treat [entities] differently in a context where they appear similarly situated, we remand the case to the Commission for a fuller explanation.").

[51] *Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995) (citation omitted).

[52] *Assoc. Gas Distribs. v. FERC*, 893 F.2d 349, 361 (D.C. Cir. 1989) (citation and internal quotation marks omitted).

[53] *Rep. Airline Inc. v. U.S. Dep't of Transp*., 669 F.3d 296, 299 (D.C. Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

[54] *Assoc. Gas Distribs.,* 893 F.2d at 361 (citation and internal quotation marks omitted).

[55] *Del. Dep't of Nat. Res*., 785 F.3d at 11 (citation and internal quotation marks omitted).

[56] *Allentown Mack*, 552 U.S. at 375.

[57] *State Farm,* 463 U.S. at 43; *see also New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) ("an agency's reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary") (quotation mark omitted).

[58] *Nat'l Fuel*, 468 F.3d at 839 (quoting *State Farm*, 463 U.S. at 43)).

bridge" between testimony and the credibility determination evident in Opinion No. 549 and supported by substantial evidence.[59] Finding testimony not credible regarding one issue does not support rejection of the testimony as to other issues.[60] The Fourth Circuit recognized that, "[o]therwise, savvy ALJ[]s could simply ground their judgments in broad, categorical statements that they credit all of one party's witnesses and discredit all of the other party's witnesses, and thereby effectively insulate their decisions from meaningful judicial review."[61] That is exactly what Opinion No. 549 and the ID have done in this case.

Opinion No. 549 fails to meet any of these minimum criteria for reasoned decisionmaking.

1. Opinion No. 549 Replaced the Anti-Manipulation Rule with an Indecipherable "Confluence of Factors" Standard.

To withstand scrutiny, an agency decision must clearly articulate the decisional standard that it imposed. The application of the law in Opinion No. 549 results in an impossible-to-articulate "confluence of factors" standard that operates to convert lawful conduct—where it occurs in some unspecified "confluence"—into fraudulent

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[59] *See J.C. Penney Co., Inc. v. N.L.R.B.*, 123 F.3d 988, 995 (7th Cir. 1997) (refusing to uphold the credibility determination for lacking logical bridge where Board merely adopted ALJ's bad reasoning); *Be-Lo Stores v. N.L.R.B.*, 126 F.3d 268, 279 (4th Cir. 1997) ("Where an ALJ provides no more than a generalized, conclusory statement purportedly incorporating a host of individual comparative credibility determinations with respect to multiple witnesses, we refuse to indulge the presumption that its findings are entitled to the ordinary deference"); *Burlington Industries, Inc. v. N.L.R.B.*, 680 F.2d 974, 977 (4th Cir.1982) ("We are not, however, required to accept [the] ALJ's credibility determinations where they are not supported by substantial evidence.").

[60] *See J.C. Penney*, 123 F.3d at 995 n.1 (rejecting argument that entirety of testimony should be discounted because ALJ rejected other testimony concerning different issue); *Kraushaar v. Flanigan*, 45 F.3d 1040, 1054 (7th Cir. 1995) (stating that factfinder may believe some parts of a witness's testimony while rejecting other parts); *see also Rockwell Int'l Corp. v. N.L.R.B.*, 814 F.2d 1530, 1532 n.2 (11th Cir.1987) (stating that ALJ is free to credit some portion of a witness's testimony without believing the witness's whole story).

[61] *Be-Lo Stores*, 126 F.3d at 279 (4th Cir. 1997).

manipulative conduct that violates the Anti-Manipulation Rule.[62] Indeed Opinion No. 549 began its analysis of the alleged Anti-Manipulation Rule violation with a recitation of OE's eight factors.[63] This confluence of otherwise lawful conduct, Opinion No. 549 concluded, simply cannot be explained by any other reason than intentional manipulation.[64] Opinion No. 549's confluence of factors theory is an attempt to remove from Section 4A of the NGA the requirement that the Commission plead and prove a specific intent to defraud coupled with evidence of actual fraud. Moreover, the confluence of factors theory is so devoid of meaningful control it violates basic due process norms.[65]

The Anti-Manipulation Rule adopted by the Commission to implement section 4A of the NGA "prohibits fraud."[66] "'Fraud is a question of fact that is to be determined by all the circumstances of the case'" and that "'include[s] any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.'"[67] To establish scienter requires, as relevant here, proving "intentional actions

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[62] According to the ID and Opinion No. 549, some "confluence" of otherwise lawful BP conduct combined to constitute proof of unlawful manipulation because the "confluence" of events is too great to be explained by any reason other than manipulation. ID at PP 42, 45-46, 62, 114, 126, 178, 187; Opinion No. 549 at PP 142, 225.

[63] Opinion No. 549 at P 68 (reciting OE's eight factors). OE's witnesses claimed that only four of the factors had even a theoretical measurable effect on markets. OE-129 at 212-226. Abrantes-Metz' "violation" calculations only employ three. OE-129 at 150, Table 18.

[64] Opinion No. 549 at P 225.

[65] U.S. CONST. AMEND. V; *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[66] *FERC v. Silkman*, Case Nos. 13-13054-DPW, 13-13056-DPW, Memorandum and Order Regarding Motions to Dismiss (D. Mass. Apr. 11, 2016), slip op. at 44 ("The Anti-Manipulation Rule prohibits fraud").

[67] Opinion No. 549 at P 6 (quoting *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs ¶ 31,202 at P 50 (2006) ("Order No. 670")). Although Opinion No. 549 asserted that it could establish scienter also by reckless and knowing conduct "in conjunction with a fraudulent scheme, material misrepresentation, or material omission," Opinion No. 549 predicated its finding of BP's liability on alleged intentional conduct.

taken in conjunction with a fraudulent scheme . . . ."[68] But how does the Commission's rule work where, as here, there is no evidence of fraud and the conduct and trading at issue was on its face lawful and done in the open market? Opinion No. 549 answered that "[t]rades undertaken solely for bona fide economic purposes are not violative of [the Anti-Manipulation Rule], but the very same trades, if intended to manipulate the market, are indeed prohibited."[69] This was no answer at all but merely stated the obvious – trades intended to manipulate the market are unlawful, assuming, of course, that there is evidence of unlawful intent.

Opinion No. 549's extrapolation could not end there because absent a finding of fraudulent intent, for which there is no material direct evidence in this case, BP's conduct was entirely lawful. In an attempt to close the loop, Opinion No. 549 adopted OE's "confluence of factors" theory whereby otherwise lawful trading is converted to fraudulent manipulative trading that violates the Anti-Manipulation Rule because some unstated minimum combination of factors purportedly support a conclusion that no explanation other than manipulative intent could explain the confluence. By adopting this amorphous "we know manipulation when we see it" standard, and failing adequately to explain it, Opinion No. 549 fatally erred.

This is the sort of overreach criticized by the D.C. Circuit in *Select Specialty Hospital v. Burwell*: "there are cases where an agency's failure to state its reasoning or adopt an intelligible decisional standard is so glaring that we can declare with confidence

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[68] *Id.*

[69] Opinion No. 549 at P 51 (citing ID at P 42).

that the agency action was arbitrary and capricious."[70] In *Burwell*, the issue hinged on the Provider Review and Reimbursement Board's ("Board") failure to articulate an understandable standard for what constituted a "new hospital" under the applicable regulations.[71] The court criticized the flexibility in the Board's articulation of the standard, which did not delineate what would and would not constitute a "new hospital."[72] Opinion No. 549's confluence of factors theory is similarly amorphous and its use is arbitrary and capricious. That is because, as BP argued in its Brief on Exceptions, the confluence of factors theory is designed to avoid criticism of each underlying factor.[73]

Opinion No. 549's refusal to meaningfully consider BP's exceptions with respect to the confluence of factors issue reinforces the infirmity of the theory. For example, Opinion No. 549 ignored material evidence identified by BP that contradicts OE's theory. BP explained that the record evidence established that the four of OE's "factors" that OE witnesses claimed had any measurable market effect could not support OE's theory of manipulation at all because they were factually incorrect. BP explained in its Brief on Exceptions that:

> The ID erroneously asserts that the two next largest market participants trading at HSC did not show the same trading patterns as the Texas team. There is no basis for this assertion, nor was any rigorous analysis of those two participants' activities examined. The ID acknowledges that those two other large sellers at HSC sold gas early, which is one of the ID's factors underlying the "confluence." Evans explained that Abrantes-Metz's

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70 757 F.3d 308, 312 (D.C. Cir. 2014) (quoting *Checkosky v. SEC*, 23 F.3d 452, 463 (D.C. Cir. 1994)).

71 *Burwell*, 757 F.3d at 313-14.

72 *Id.*

73 BOE at 40. Opinion No. 549 did not directly address this point.

> distance analysis produces similar results for those same two sellers, which is a second factor underlying the "confluence," but the ID fails to rebut this direct criticism. Abrantes-Metz conceded at hearing that even though the data was available to her, she declined to conduct a bid-hitting analysis (a third factor underlying the "confluence") of those two market participants on an all-day basis in order to determine whether they exhibited behavior similar to the trading that forms a basis of the ID's confluence of factors. To the contrary, OE conceded that other market participants could have had larger unexplained increases in bid-hitting than BP, but OE's witnesses failed to check. Finally, even the ID acknowledges that some of the same trading patterns on which it relies to find BP liable for a manipulative scheme were being undertaken at the Katy location, which is not alleged to have been manipulated, as discussed further below.[74]

Failing to contend with these arguments, and repeatedly failing to recognize that the alleged changes in BP trading patterns cited by Abrantes-Metz were consistent with changes observed in the marketplace, Opinion No. 549 instead retreated to the following unreasoned and conclusory rebuttal. It substituted "totality" for "confluence" and asserted that "based on the totality of the evidence," BP engaged in intentional manipulation.[75] Opinion No. 549's determination that it need not address BP's material arguments point by point underscores the amorphous and incomprehensible nature of the confluence of factors theory.

In its Brief on Exceptions, BP pointed out that the confluence of factors test used to establish probable cause in criminal law requires that each factor must serve to eliminate innocent actors.[76] Opinion No. 549 says this precedent is inapplicable and

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74 BOE at 42, citing Tr. 1877:15 to 1877:18.

75 Opinion No. 549 at P 32.

76 BOE at 41-42.

irrelevant.[77] Opinion No. 549 misses the point. If the confluence of factors does not differentiate the innocent from the allegedly guilty, it has no logical relevance.

Further revealing the amorphous nature of Opinion No. 549's reasoning and the lack of any articulable standard against which it measured BP's conduct, Opinion No. 549 employed mercurial reasoning throughout. Opinion No. 549 emphasized and deemphasized the importance of individual factors at will. In each instance where BP undermined a specific factor, Opinion No. 549 shirked its obligation to analyze the validity of that individual factor. As BP explained in its Brief on Exceptions, the ID's focus on the totality of factors served as "an artifice designed to avoid criticism of each underlying factor."[78] Relying on the asserted "totality" of conduct and unsupported credibility determinations in order to evade meaningful analysis of each specific factor, Opinion No. 549 failed to engage in reasoned decisionmaking. It left unanswered what minimum set of lawful factors may constitute a "confluence" that converts lawful trading into unlawful fraud. Stated differently, Opinion No. 549's treatment of the "confluence" of factors begs the question – how many factors must be rebutted before the house of cards upon which OE built its theory of manipulation topples? And how should they be weighted? Opinion No. 549 failed to identify how many individually irrelevant inferences must be present before a "totality of factors" emerges. Because Opinion No. 549 provided no framework for where the bar should be set, it lacks transparency or verifiability.

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[77] Opinion No. 549 at P 142.

[78] BOE at 40.

For example, Opinion No. 549 disregarded BP's argument on exceptions that the ID incorrectly relied on Abrantes-Metz's flawed regression analysis for its conclusion that BP uneconomically transported natural gas from Katy to HSC. Without dealing with BP's challenge to that flawed analysis, Opinion No. 549 determined that the alleged manipulation:

> rest[s] not only on evidence of unprofitable transport and trading, but also on BP's significant change in trading patterns, as confirmed by econometric analyses, involving uneconomic transport to Houston Ship Channel and increased early and heavy trading at artificially low prices at Houston Ship Channel, where BP became the largest net seller during the Investigative Period, as well as substantial corroborating evidence of scienter.[79]

Opinion No. 549 also rejected BP's argument on exceptions that its bid-hitting rates during the IP were not unusual in the context of other market participants and a broader time period. Treating this supposed "marker" of manipulation as inextricably linked to the "totality of factors," the opinion failed to consider the standalone validity of this factor. Instead, it emphasized Abrantes-Metz's statement that "[i]n isolation, bid hitting is insignificant, but it's not when applied to the massive increase in volume."[80] Opinion No. 549 based its finding of manipulative intent on "BP's simultaneous increases in net selling, sales volume, and fixed-price sales, including sales increasingly made by hitting bids" which, it concluded, "*collectively* had—and was intended to have—a suppressing effect on the Houston Ship Channel *Gas Daily* index."[81] Remarkably, an admittedly insignificant factor becomes, through some alchemy,

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[79] Opinion No. 549 at P 47.

[80] *Id*. at P 126.

[81] *Id*. (emphasis added and internal parenthetical omitted).

evidence of manipulation merely by being combined with other factors that individually are not probative of unlawful intent.

In another example, Opinion No. 549 ignored BP's assertion on exceptions that the Texas Team's trading at HSC during the IP aligned with how other market participants were trading. It concluded that "evidence that two other market participants had equal or even greater distance to their offer-initiated sales at Houston Ship Channel" did not "necessarily diminish an inference of manipulative conduct on the part of BP."[82]

Opinion No. 549's failure to meaningfully consider BP's assertions extends to the conclusion that it draws from the confluence of lawful events—that BP intended to trade physical natural gas uneconomically to benefit BP's financial spread positions. Opinion No. 549 concluded that BP lacked a "reasonable explanation for these changes," other than manipulation, largely because of the presumed unprofitability that resulted from alleged changes in trading patterns.[83] Opinion No. 549 dealt with this aspect of OE's manipulation theory like it did with each of the factors. When BP undermined the assertion that its trading was uneconomic, the opinion again retreated to the "totality" of factors, this time the alleged shift in trading behavior. When BP pointed out that it had losses in 2007, Opinion No. 549 again shifted the emphasis of the "factors," explaining this time that "what matters in this case is that the losses during the Investigative Period were accompanied by the change in trading patterns."[84] And Opinion No. 549 stated that profitability was not the "lynchpin" of its findings because "[l]ack of profitability—i.e., uneconomic trading—is one indicia of manipulative activity, but it is not an absolute

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82 *Id.* at P 120.

83 *Id*. at P 140.

84 *Id*. at P 136.

requirement in order to find manipulation."[85] In other words, lack of profitability is important to the case, except when it is not.

Opinion No. 549 left incomprehensible what combination of lawful activity the Commission may deem fraudulent and a violation of the Anti-Manipulation Rule. This is unlawful and unreasoned decisionmaking. As the D.C. Circuit has explained, when "ambiguity begets ambiguity, making it such that we cannot discern the decisional standard, much less the correctness of its application, we have little choice but to declare the decision arbitrary and capricious . . . ."[86] The "confluence of factors" theory suffers the same sweeping lack of clarity as the incomprehensible decisional standard in *Burwell*.[87] Such an "amorphous rule is, by definition, arbitrary and capricious."[88]

2. Opinion No. 549's Treatment of Each of the "Factors" in the "Confluence" is Unreasoned and Not Supported by Substantial Evidence.

In the following subsections, BP addresses each of the material "factors" that Opinion No. 549 incorrectly claimed establishes fraud.[89]

a. Opinion No. 549 Erred in Approving Abrantes-Metz's Next-Day Fixed-Price Sales Analysis.

Abrantes-Metz purported to analyze BP's next-day fixed price trading at HSC and concluded that BP: (1) became the seller with [the] largest market share of fixed-price

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[85] *Id*. at P 134.

[86] *Select Specialty Hospital-Bloomington, Inv. v. Burwell*, 757 F.3d 308, 314 (D.C. Cir. 2014); *see Coburn v. McHugh*, 679 F.3d 924, 934 (D.C. Cir. 2012).

[87] *Burwell*, 757 F.3d at 314.

[88] *Id*. at 314 (citing *Coburn v. McHugh*, 679 F.3d 924, 934 (D.C. Cir. 2012) (noting agency decisions that "lack coherence" and "make it impossible for this court to determine whether [such decisions] survive arbitrary and capricious review under the APA" fail the test of "reasoned decisionmaking")).

[89] While OE listed eight factors, only four are alleged to have any measurable impact on the market.

sales; and (2) increased the percentage and volume of its fixed price sales.[90] Opinion No. 549 erred in finding that BP did not dispute or rebut these allegations.[91]

Opinion No. 549 stated that BP failed to respond to the finding that "BP became the seller with the largest market share during the Investigative Period."[92] First of all, whether BP was the seller with the largest market share of fixed-price sales at HSC is irrelevant here. NGA Section 4A prohibits "any manipulative or deceptive device or contrivance,"[93] and the Commission's Anti-Manipulation Rule likewise prohibits the use or employment of "any device, scheme, or artifice to defraud . . . ."[94] These provisions prohibit fraud, not size.[95]

Congress knows how to prohibit size when it intends to do so. For example, Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracy to monopolize.[96] Likewise, in the Dodd-Frank Act, Congress enhanced the CFTC's authority to promulgate position limits.[97] Section 4A contains no such prohibition. To the extent Opinion No. 549 was based on the size of BP's market share at HSC, it did so without legal basis and is, therefore, arbitrary and capricious and not based on reasoned decisionmaking.

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90 Opinion No. 549 at P 78.

91 *Id.*

92 *Id.*

93 15 U.S.C. § 717c-1 (2016).

94 18 C.F.R. § 1c.1 (2016).

95 *FERC v. Silkman*, Case Nos. 13-13054-DPW, 13-13056-DPW, Memorandum and Order Regarding Motions to Dismiss (Apr. 11, 2016), slip op. at 44 ("The Anti-Manipulation Rule prohibits fraud").

96 15 U.S.C. § 2 (2016).

97 Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 737, 124 Stat. 1722 (codified as amended at 7 U.S.C. § 6a (2010)).

Second, BP did rebut Abrantes-Metz's next day fixed-price analysis with evidence that placed the increase in fixed-price sales at HSC in context, and showed that this increase was not based on fraud, but rather on legitimate factors.[98] Opinion No. 549 erred in ignoring this evidence.

As Evans explained, the larger market share is a logical and expected result of a larger baseload position that BP had going into the Investigative Period. Opinion No. 549 ignored this evidence in concluding that "it is clear that BP's increase in fixed price sales during the Investigative Period is anomalous."[99] Opinion No. 549 rejected Evans' testimony because he "couched his arguments in terms of the ***proportion or percentage*** of fixed price trading historically, at Katy and by other market participants but never analyzed the ***volumes*** of such fixed price trading."[100] However, Opinion No. 549 never explained why this is a sufficient basis for rejecting Evans' testimony. It is not. Evans offered substantial evidence for concluding that Abrantes-Metz's analyses "support the proposition that BP altered its trading behaviors in the day-ahead market because it had a larger baseload position."[101] Abrantes-Metz's conclusions based upon the increased volumes of next-day fixed price sales ignore the larger baseload position and the attendant need to sell the gas. Opinion No. 549 similarly erred by ignoring this explanation.[102]

Opinion No. 549 also ignored the record evidence that BP's fixed-price trading as a percentage of sales was consistent with a number of months in Abrantes-Metz's own

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98 *See, e.g.*, BOE at 31-32.

99 Opinion No. 549 at P 79.

100 *Id*. at P 79 (emphasis in original).

101 *See*, *e.g.*, Ex. BP-037 at 15:14-16.

102 Opinion No. 549 at PP 78-83.

flawed Pre-Investigative Period.[103] The evidence shows that within that period, there are five months (February, April, May, June, and August 2008) in which BP's percentage of HSC fixed-price sales was between 90-100 percent.[104] Opinion No. 549 ignored this evidence and focused instead on changes in volume in absolute terms, which as demonstrated above, ignores BP's larger baseload position and draws upon a Pre-IP selected by Abrantes-Metz that is not comparable because BP had no baseload positions in the Pre-IP period comparable to those in the IP.[105]

Opinion No. 549 also erred in ignoring the evidence that, when viewed in historical context, BP's fixed-price sales in the IP were consistent with its sales in other years.[106] Equally erroneous was Opinion No. 549's sanctioning of Abrantes-Metz's failure to even consider whether BP's increase in fixed-price sales was consistent with the market as a whole and the trading behavior of other large market participants.[107]

In short, Opinion No. 549's approval of Abrantes-Metz's next-day fixed-price sales analysis to establish manipulative intent and the ID's reliance thereon was error.

b. Opinion No. 549 Erred in Approving Abrantes-Metz's Timing Analysis of Sales and Purchases at HSC.

Opinion No. 549 erred in affirming the ID's findings "that BP shifted to earlier, heavy selling and later purchases at Houston Ship Channel during the Investigative

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[103] *Id.* at PP 78-83.

[104] Ex. BP-037 at 19:1-19:5.

[105] It is particularly incongruous that Opinion No. 549 cited with approval Abrantes-Metz's use of prior period data to support her opinions (Opinion No. 549 at P 80), yet found that there was no need to consider such evidence when it contradicts her conclusions. *See, e.g.*, Opinion No. 549 at PP 149-51. Here again, no meaningful path exists to explain this disparate treatment of evidence.

[106] Ex. BP-037 at 19:1-19:6.

[107] Opinion No. 549 at P 82.

Period, as demonstrated in the analyses from Abrantes-Metz" as evidence of both an intent to manipulate and actual manipulation.[108]

No matter what it is called, as the ID made clear, this finding reflects the application of OE's "marking" or "framing" the open theory in this case.[109] As the ID stated:

> Dr. Abrantes-Metz testified that the shift to earlier heavy selling at HSC by the Texas team was important because heavy, early selling more significantly influences price formation than later selling. The earliest trades convey the first available concrete information about price, price direction, and volume in that market on each day. The information of these early trades becomes incorporated into the bids, offers, and prices by subsequent market participants and can persist throughout the trading session. Specifically, this witness testified the first five minutes of trading, the most heavily traded interval in the HSC market (roughly 11 percent of daily volume) presented the greatest opportunity to influence prices.
>
> Her findings show that in the Pre-IP, the Texas [T]eam's share of sales at HSC in the first five minutes of trading averaged just 3 percent. However, this increased to 42 percent in the Investigative Period. Heavy one-directional selling early in the trading session has a greater likelihood of having an indirect, informational impact on the bids, offers, and prices of subsequent market participants. Knowing this, market manipulators attempt to indirectly influence other market participants to shift their trading in the direction that benefits the manipulator. ***Repeatedly making one-directional trades very early in a trading session is one way to accomplish this goal, known as "marking" or "framing" the open. The Texas team's early selling also indirectly impaired the functioning of***

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[108] *Id.* at P 90.

[109] Opinion No. 549 denied BP's Request for Rehearing on BP's argument that the Order Scheduling Hearing denied BP due process by failing to provide adequate notice of potentially impermissible behavior and was arbitrary and capricious and lacked reasoned decisionmaking by rejecting this flawed theory of manipulation. BP does ***not*** seek rehearing on the issues insofar as Opinion No. 549 constitutes a denial of BP's Request for Rehearing. Rather, BP seeks rehearing on the Opinion No. 549's ***application*** of the "marking" or "framing" the open theory in affirming the findings of the ID.

> ***the next-day fixed-price market at HSC by "marking" or "framing" the open.***"[110]

Opinion No. 549 reflects multiple errors in affirming this finding.

First, there is no evidence in the record that earlier trades influence prices throughout the day. Abrantes-Metz offered no support for this conclusion beyond her mere supposition. Neither Abrantes-Metz, the ID, nor Opinion No. 549 cited to any research, academic study, or statistical analysis that even suggests that early selling affects other market participants' trading behavior or alters the index.[111] Nor is there any record evidence that earlier trades did influence prices in this case.

Opinion No. 549's explanation of OE's "more nuanced" theory seems to acknowledge this fundamental flaw. Opinion No. 549 rejected the notion, as BP had explained it, that early trading will "'significantly dictate' another market participant's trading later in the day."[112] Rather, as Opinion No. 549 explained, this "more nuanced" theory is that:

> large-volume trades will weigh heavily on a volume-weighted index, and that means that large-volume trades executed early in the relevant trading period will have an impact on the developing index, which in turn ***can influence the trading decision that other market participants may decide to make later in the same trading period***."[113]

Opinion No. 549 further stated that:

> a volume-weighted average price-based index, like the Houston Ship Channel Gas Daily index, ***plausibly can be***

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[110] ID at PP 47-48 (emphasis added and footnotes omitted).

[111] This is in stark contrast to the standard to which Opinion No. 549 repeatedly holds Evans. *See*, *e.g.*, Opinion No. 549 at PP 92, 106, 151, 171, 178.

[112] *Id*. at P 48.

[113] Opinion No. 549 at P 48 (emphasis added).

> ***subject to manipulation*** by trading that takes place during the time period in which the volume-weighted average of transactions forming the index is calculated, including by high-volume early trades at deceptively low prices unrelated to the genuine economics of supply and demand that suppress the volume-weighted index.[114]

Whether so-called "early trading" "***can influence***" the trading decisions that other participants "***may decide to make***" or whether an index "***plausibly can be subject to manipulation***" are nothing more than theoretical constructs and evidence nothing. They are statements of mere possibilities. OE had a burden to prove that such events actually occurred, not to rely on theories "based on speculation."[115] OE neither alleged nor proved that (1) market participants actually calculated a "developing index" throughout the day, or (2) market participants actually reacted to a "developing index" throughout the day. Without credible record evidence that BP's "early trading" had this effect, and there is none, these statements and Abrantes-Metz's "analysis" provide no basis for finding manipulative conduct, and no inference of an intent to manipulate can be made.

Opinion No. 549 also erred in finding that Evans "improperly aggregates purchases and sales into 'trades' when analyzing the timing of BP's fixed price trading at Houston Ship Channel."[116] The rationale for excluding purchases expressed in Opinion No. 549 was that "the claim of manipulation against BP involves its transport to and ***selling*** behavior at Houston Ship Channel to suppress prices that affect the *Gas Daily* index, and increased ***buying*** at Katy to facilitate such sales at Houston Ship Channel."[117]

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[114] *Id.* at P 49 n.98 (emphasis added).

[115] *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015).

[116] Opinion No. 549 at P 90 (emphasis in original).

[117] *Id*. (emphasis in original).

The *Gas Daily* Index reflects both purchases ***and*** sales. Platts instructs participants to "report each business day ***all*** fixed-price physical deals completed prior to the industry nomination deadline (11:30 am Central Prevailing Time) for next-day pipeline delivery in North America."[118] Accordingly, if the object of the exercise is to attempt to determine whether "early" trading had an impact on the HSC index, all trades – both purchases and sales – must be included. Excluding purchases from the analysis cannot yield a valid conclusion about the impact on the index (assuming, *arguendo*, that it is even theoretically possible to do so). It was arbitrary and capricious and not reasoned decisionmaking to exclude purchases at HSC from the analysis because the charge relates to BP's "selling behavior" at HSC.

By complaining of "early" trades that allegedly suppressed the index unlawfully, Opinion No. 549 declared that trades conducted at the "opening" of the market were not "genuine" because they were at "deceptively low prices."[119] But this *post-hoc* rationalization assumes that prices resulting from trades between willing buyers and sellers were suspect simply because they were among the first of the day. There is absolutely no evidence or rationale supporting this convenient assumption. And if this assumption were to become the law, every early-morning trader would act at his or her peril, depending on where the index settled at the end of the day and which confluence of factors would later be applied to presume fraudulent intent.

Additionally, the definition of "early" adopted in Opinion No. 549 provides no standard at all. Opinion No. 549 held:

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[118] Methodology and Specifications Guide, Platts: North American Natural Gas at 3 (June 2014) (emphasis added).

[119] Opinion No. 549 at P 49 n.98.

> Regardless of whether the time-period during which an index or settlement price is determined is ***two-minutes, thirty minutes*** (as in *Amaranth*), or ***several hours*** (as in a *Gas Daily* index), ***or some other period of time***, the essential point remains: a volume-weighted average price-based index, like the Houston Ship Channel *Gas Daily* index, plausibly ***can be*** subject to manipulation by trading that takes place during the time period in which the volume-weighted average of transactions forming the index is calculated, including by high-volume early trades at deceptively low prices unrelated to the genuine economics of supply and demand that suppress the volume-weighted index.[120]

Defining "early" in such a meaningless fashion is reminiscent of Humpty Dumpty's pronouncement that a word "means just what I choose it to mean . . . ."[121] This "definition" is arbitrary and capricious and does not reflect reasoned decisionmaking. This is particularly true given that Opinion No. 549 improperly rejected the time frame Evans used to rebut Abrantes-Metz's testimony as "deceptive."[122] There was nothing "deceptive" about Evans' time frame. Particularly in a market where there is no "open," the decision to reject Evans' time frame, and essentially to use an undefined moving target to establish "earliness" is arbitrary and capricious.

Furthermore, the HSC *Gas Daily* index is not set at any one point in the trading day, but rather is computed on the trades that occur throughout the trading day:

> For the daily market, Platts publishes three price components: the midpoint (the volume-weighted average), the common range and the absolute range. The daily midpoint, commonly called the GDA (Gas Daily average)

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[120] *Id.* (emphasis added).

[121] Lewis Carroll, *Through the Looking Glass*, Ch. 6, p. 205 (1934):

> "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"

[122] Opinion No. 549 at P 93.

> is the volume-weighted average of ***all the transactions reported to Platts*** that are used to calculate the index for each point.[123]

Thus, Opinion No. 549's definition could include trades during the entire trading window under the rubric of "early." This is wholly inconsistent with the requirements of the APA.

For these realities about the way in which the index develops over the course of a trading day, Opinion No. 549's apple selling analogy was flawed.[124] The analogy makes no sense unless the early seller of apples is clairvoyant and knows where the price will go throughout the day. Of course, the early seller cannot know what others in the market will do. A more relevant analogy would be along these lines:

Bobby has to sell 100 apples by the end of the day. In order to make sure that he does that, at 9:00 AM he is willing to sell 30 apples at $0.80 per apple. He sells 30 apples. He thinks to himself, "phew, only 70 left to sell today. I hope the price gets even better, but who could know!? Maybe that was the best price I'll see all day." Bobby continues selling apples that day. Remember, he has no choice; he must sell 70 more apples. By 3:00 in the afternoon, it turns out that the price did go up. Now apples are selling for $0.85 each. Lucky Bobby—or so he thinks. Bobby sells more apples at $0.85, but of course not the 30 from the morning. He already sold those.

The next day, Bobby's stepfather, Mr. Hindsight, looks at a report of how the price of apples changed throughout the day. He's furious. Why didn't Bobby wait and sell all of the apples at 3:00!? He could have made five cents more per apple! Bobby

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[123] S&P Global Platts, *Methodology and Specifications Guide North American Natural Gas* at 4(June 2016), *available at* https://www.platts.com/IM.Platts.Content/MethodologyReferences/MethodologySpecs/na_gas_methodology.pdf.

[124] Opinion No. 549 at P 50 n.100.

must have wanted to lose money or at best been indifferent to making money. There's simply no other explanation. Distraught, Bobby tries to explain to Mr. Hindsight that he did not know whether the price would go up or down when he sold the apples that morning. If he had waited and the price went down, Mr. Hindsight could just as easily say that Bobby had waited on purpose in order to lose money by not taking advantage of the good morning price.

Bergin's testimony is in line with this analogy. He testified that a trader "do[es]n't know what the *Gas Daily* average value would come in at [at] the end of the day when [he] come[s] in at the beginning of the day."[125] The reason is because the trader does not know what will happen in the future. For that reason, Bergin agreed that traders do not make decisions with the benefit of hindsight. Rather, for traders like BP's traders, "the focus is on what they see on their screen, not at the end of the day but minute-by-minute throughout the day . . . ."[126]

c. Opinion No. 549 Erred in Approving Abrantes-Metz's Transport Regression Analysis and Conclusions Regarding Alleged Uneconomic Use of Houston Pipeline.

As BP noted in its Brief on Exceptions, Abrantes-Metz's transport regression analysis suffered from at least three fatal flaws: (1) it incorrectly used *Gas Daily* end-of-day prices instead of intra-day prices; (2) it failed to account for other criteria that influence transport volumes; and (3) it failed to consider other time periods where BP had comparable baseload positions.[127] Opinion No. 549 failed to apply any reasoned analysis

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[125] Tr. 1650:20-22.

[126] Tr. 1651:3-7 (Bergin confirming questioner's proposition as "correct.").

[127] *See*, *e.g.*, BOE at 34-35.

to these objections and instead placed its imprimatur on her "analysis" designed simply to support her preconceived hypothesis regarding BP's supposedly uneconomic use of its HPL transport.[128]

Opinion No. 549 approved Abrantes-Metz's use of *Gas Daily* end-of-day prices, noting that: "BP's traders and compliance department also used *Gas Daily* prices which are an industry standard of daily benchmarks used in the settlement of financial contracts and daily and monthly physical contracts . . . ."[129] However, use of those prices to settle contracts does not make them relevant to analyzing purported manipulation. Taken at face value, this statement says nothing about the use of *Gas Daily* for transportation or pipeline utilization or any other concept that could support how end-of-day spreads are used in the transportation portion of Abrantes-Metz's analysis. Opinion No. 549 cited no record evidence that BP, or anyone in the natural gas industry, uses *Gas Daily* end-of-day prices for making transport decisions during the trading day. The reason for that is simple. Traders make transport, and trading, decisions on a moment's notice throughout the trading day. They make those decisions based on the intraday prices they see in the market in real time. The *Gas Daily* end-of-day prices are not compiled until long after the trading day has ended. *Gas Daily* end-of-day prices are useful only to determine whether, in hindsight, the real-time decision was correct.

Opinion No. 549 incorrectly disregarded as "out of context" BP's reliance on Bergin's testimony that "[a]n economic decision does not require that a particular trade turn out to have been profitable at the end of day – but it means that the trade was the

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[128] Opinion No. 549 at PP 101-07.

[129] *Id.* at P 102.

most profitable option at the time of the decision."[130] The fact that his testimony related to a discussion of the impact of BP's baseload position on its trading activity is of no moment. The point is that Bergin concedes, as he must, that traders make decisions throughout the trading day based on the data available to them. Bergin's testimony amply demonstrated that the data Abrantes-Metz used to judge BP's transport decisions was not available when BP personnel made those decisions, thus invalidating her analysis completely.

Bergin's workpapers included a chart of what he determined to be the "HSC P&L" using next-day fixed-price sales marked against the end-of-day *Gas Daily* daily index.[131] In those workpapers, Bergin showed what he labeled "HPL Transport P&L," and according to the data in his chart, the end-of-day Katy price was 25.5 cents higher than the HPL price.[132] Bergin testified as follows:

> Q When we talk about trading, traders throughout the day see spreads between two points when they're both trading. They will see consummated trades at HSC. They will see consummated trades at Katy.
>
> Do you agree with that?
>
> A Sure.
>
> Q They watch that throughout the day. Would you agree that one way to characterize that is to call that the contemporaneous tradable spread?
>
> A You're looking at the real-time spread?
>
> Q Yeah, the real-time spread, better words. So throughout the day, as trades happen, traders are watching how that spread develops. ***Now, on trade date September 18th for delivery on***

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130 *Id.* 549 at P 103; Ex. OE-001 at 115:7-115:9.

131 Tr. 1623:10-1624:3; Ex. BP-55 (tab "phys P&L by day"); Ex. OE-124 (tab "Phys P&L by day").

132 Tr. at 1625:3-6.

> ***September 19th, do you know, Mr. Bergin, whether at any point in the day the real-time spread the traders saw was Katy being 25.5 cents over ship?***
>
> A ***I know that it wasn't.***
>
> Q Not one time; right?
>
> A Yes.
>
> Q You know at no time during the day was the real-time spread 25.5 cents?
>
> A That's correct.
>
> Q ***So when traders are sitting at their terminals trying to figure out what to do, they never saw 25.5 cents during the day; right?***
>
> A ***That's correct.***[133]

Opinion No. 549 also incorrectly accepted Abrantes-Metz's analysis based on the fact that the intraday price differential was "in the same direction" as the *Gas Daily* price differential 60 percent of the time.[134] The failure to cite any authority for the proposition that a correlation of slightly more than half is a sufficient basis to accept a statistical analysis shows that this is not reasoned decision making. Further, Opinion No. 549 was arbitrary and capricious in accepting Abrantes-Metz's analysis based upon prices being on the correct side of zero 60 percent of the time.[135] Opinion No. 549 did not provide transparent and consistent thresholds to determine which mathematical results will be accepted. The ID (and Opinion No. 549) rejected assertions that were not "statistical" in

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[133] Tr. at 1625:18-1626:14 (emphasis added).

[134] Opinion No. 549 at P 105.

[135] *Id.*

some circumstances,[136] but in other circumstances (like here for Abrantes-Metz's intraday differential) inconsistently accepted results on face value, without any statistical statement.[137]

Opinion No. 549's tendency to pick and choose when to accept a statistically significant result was even more pronounced in its treatment of the different transportation models proffered by Abrantes-Metz and Evans. Opinion No. 549 reasoned that Abrantes-Metz's data must be of acceptable quality if the model finds a statistically significant result:

> If, as BP asserts, *Gas Daily* prices were a poor indicator of prevailing intraday prices, and the Texas Team relied on intraday prices to optimize the usage of the Houston Pipeline System transport, the regression analysis should not be able to find a statistically significant relationship between a difference in daily *Gas Daily* prices at Houston Ship Channel and Katy and Houston Pipeline System transport usage by the Texas Team. The regression analysis however did find this statistically significant relationship during the Pre-Investigative Period and no such relationship during the Investigative Period.[138]

However, Opinion No. 549 chose not to apply this same rationale consistently to Evans' re-run of Abrantes-Metz's transportation analysis.[139] Evans' model also found a statistically significant relationship between a difference in daily *Gas Daily* prices at HSC and Katy and Houston Pipeline System transport usage by the Texas Team in both the IP

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[136] *See, e.g.*, ID at P 58 n.52 (noting Evans "performed no statistical analysis on seasonal patterns"); Opinion No. 549 at P 106 (finding that "BP failed to provide evidentiary or statistical support for its criticisms").

[137] ID at P 60 n.42; Opinion No. 549 at P 105.

[138] Opinion No. 549 at P 105.

[139] *Id.* at P 103 (concluding the "BP quotes Bergin out of context when arguing that he supports use of intraday pricing").

and the Pre-IP.[140] Opinion No. 549 offered no rationale for rejecting Evans' result, based on intraday price spreads, when it too produced statistically significant results using the same standard applied to OE's own witnesses.

Opinion No. 549 improperly rejected BP's evidence that Abrantes-Metz's analysis failed to consider other rational decision criteria that influence transport volumes because BP provided only "possible" alternative explanations.[141] This has the effect of shifting the burden of proof to BP, as discussed *supra.* Accordingly, the conclusion is arbitrary, capricious, and not in accordance with law.[142] Similarly, as demonstrated, the ID improperly ignored record evidence in rejecting Evans' seasonality evidence regarding transport utilization.[143]

The flaws in the OE analysis of transportation losses are not limited to the use of an end-of-day methodology. The issue of the profitability of the Texas Team's use of transportation is at the heart of this case. Opinion No. 549 stated:

> As the transcript [of the November 5, 2008 call] shows, in telling Comfort about his conversation with Parker, Luskie reveals the existence and key elements of the Texas Team's manipulative scheme:
>
> 'So I was telling him how we, you know, what we are doing at Ship Channel this month . . . what kind of what we do and strategy and what not. And I was telling him about our Houston Pipeline System transport. And the way I explained it was not very good. And I came off sounding like we either transport or don't transport solely on the –

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[140] BP-37 at 44:5 to 45:12 ("the model does not show that BP's transportation decisions became delinked from market price incentives.").

[141] Opinion No. 549 at P 106.

[142] *See, e.g.*, 5 U.S.C. § 556 (2016); 15 U.S.C. § 717c-1 (2016); 18 C.F.R. § 1c.1 (2016); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

[143] *See infra* Section IV.B.3.a.i.

> kind of how we think it's going to affect the index and help our paper position.'[144]

The only "element" of the alleged "scheme" identified in the November 5 tape is the issue of uneconomic transport. OE witness Abrantes-Metz specifically targeted this issue in her direct testimony:

> Q. Please explain the role of the HPL capacity in the Texas team's manipulative scheme.
>
> A. The Texas team's discretion to use the HPL capacity was crucial in facilitating their manipulative scheme in a manner that would not raise suspicions. As I previously demonstrated in Part III, the Texas team sought to suppress HSC prices by increasing the supply of next-day fixed price gas at HSC. To do this, the Texas team required an external source of gas, *i.e.*, gas that was not already destined for the HSC market.[145]

Abrantes-Metz specifically claimed that the utilization of the transportation was unprofitable, basing her calculations on a scheduling spreadsheet, referred to as the Katy-Ship Sheet. Abrantes-Metz stated:

> To compute the actual daily Transport P&L, the Katy-Ship Sheet formula subtracted the Texas team's estimated Katy GDD and variable cost of transport from their estimated HSC GDD. The final step in the Transport P&L computation was to multiply the resulting figure by the volume of gas transported. Regardless of the volume transported, however, the Texas team's Transport P&L was mathematically always positive when they transported any volume and the HSC-Katy spread was greater than the cost of transport.[146]

Based on this analysis, Abrantes-Metz concluded:

> Q. Are the large transport losses shown in the second half of September and October important to your analysis?

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[144] Opinion No. 549 at P 196.

[145] Ex. OE-129, at 78:11-17.

[146] *Id.* at 84:3-9.

> A. Yes. The consistent and proportionately larger transport losses I observe in September and October should not have occurred naturally.[147]

Abrantes-Metz's testimony rested on two assumptions: (1) that transportation was being used to move additional supplies of next-day, fixed-price gas to HSC "that was not already destined for Houston Ship Channel" and (2) that the Katy-Ship Sheets captured the transportation losses associated with transportation of incremental next-day, fixed-price gas to HSC.

The record evidence shows that for the months of September and October (the two months in which Abrantes-Metz claimed heavy transportation losses occurred), both assumptions were wrong.

During the hearing, Luskie was called as a witness by both BP and by OE (as an adverse witness). During the course of his cross-examination by OE, Luskie was questioned by OE regarding the Katy-Ship Sheets, the calculation of the "transport diff" values and the nature of baseload positions.[148]

In response to these questions, counsel for BP conducted, without objection, additional examination of Luskie on the Katy-Ship Sheet, focusing on Ex. BP-41:

> Q. Mr. Luskie, I want to have an understanding, more than surface understanding, of how this sheet works, and I would like to direct your attention first to the row labeled "opening (B/L)." We're looking at row 13 under the column "x", "HPL." Opening B/L shows a negative 60,447; correct?
>
> A. That is correct.
>
> Q. What does this mean? What is it?

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147 *Id*. at 86:3-6.

148 Tr. 431:2-5; Tr. 439:6-14.

A. This means that at the beginning of the month we had sold 60,447 MMBtu of either Ship pool or Ship delivered gas as a baseload volume every day of the month, either via our trading activities or our marketing group.

Q. So these sales, this short position, these were not fixed price for next-day delivery?

A. That is correct.

Q. These are positions you had when you started the trading day, correct?

A. That is correct.

Q. Now let's go down to the column in row 19 labeled "Bench Deals," column 'X" still. We have "Bench Deals." What are bench deals?

A. Those would be any new deals done on that day, either at fixed price or Gas Daily.

Q. And for the fixed-price deals, these are the transactions that would go into the Gas Daily daily index for the following day; correct?

A. That is correct.

Q. Let's scroll down one more column to "transport from Katy." Mr. Luskie, what does this represent?

A. That would be the total volume that was being shipped from the general Katy area to either the Ship pool or Ship delivered markets. Just because of the way the spreadsheet works, it is also the net of the baseload deals and any day transactions done by the desk.

Q. So what this sheet reflects is that each day you were transporting from Katy to Houston Ship Channel, both bench deals and the baseload position; correct?

A. Up to some volume, yes.[149]

[149] Tr. 754:1-755:14.

Luskie was asked how the "transport diff" in cell S48 of Ex. BP-41 worked. He replied:

> So it takes cell Y40, which itself is a calculation of the Ship Channel Gas Daily . . . minus the Katy Gas Daily . . . It then takes cell Y53, which is the calculation of total variable cost on the day, combination of fuel and commodity, subtracts that. . . . And multiplies it by the total volume that is shipped for the day. . . .
>
> Q. And the volume reference in X22 is the sum of the baseload position plus the bench deals; correct?
>
> A. That is correct.[150]

On cross-examination, Abrantes-Metz admitted that she did not know what transactions actually were included in the "transport diff" calculation upon which she relied to make the claim of sustained "uneconomic transport" of additional new fixed-price natural gas for next day delivery during the months of September and October 2008.[151]

The fact is that during the months of September and October, BP transported substantial volumes of baseload gas (gas that was already destined for the HSC market and that did not have any impact on the HSC market indices). The inclusion of these irrelevant baseload gas transportation volumes fundamentally skewed Abrantes-Metz's analysis. This systematically overstated both transportation losses and total trading losses in September and October.

The following table shows, by flow date in September and October, the percentage of baseload gas embedded in each day's total transportation volume.

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[150] Tr. 757:10-757:20.

[151] Tr. 1938:1 to 1938:10.

Flow Date	Percent of Baseload Gas in Total Transport Volume
September 19, 2008	58.19%[152]
September 20-22, 2008	43.78%[153]
September 23, 2008	62.81%[154]
September 24, 2008	57.01%[155]
September 25, 2008	52.31%[156]
September 26, 2008	70.73%[157]
September 27-29, 2008	60.93%[158]
September 30, 2008	54.22%[159]
October 1, 2008	34.06%[160]
October 2, 2008	30.39%[161]
October 3, 2008	29.08%[162]
October 4-6 2008	32.50%[163]
October 7, 2008	25.37%[164]

[152] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 19, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[153] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 20-22, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[154] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 23, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[155] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 24, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[156] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 25, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[157] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 26, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[158] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 27 to September 29, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[159] Ex. OE-13 (Protected), BP-L 00146158_Official Copy.xls, September 30, 2008 tab, Cells X14 (Baseload) and X22 (Transport from Katy).

[160] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 1 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[161] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 2 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[162] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 3 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[163] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 4 to October 6 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[164] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 7 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

Flow Date	Percent of Baseload Gas in Total Transport Volume
October 8, 2008	40.98%[165]
October 9, 2008	38.39%[166]
October 10, 2008	41.97%[167]
October 11-13, 2008	32.75%[168]
October 14, 2008	46.76%[169]
October 15, 2008	29.99%[170]
October 16, 2008	40.81%[171]
October 17, 2008	58.56%[172]
October 18-20, 2008	33.68%[173]
October 21, 2008	50.2%[174]
October 22, 2008	100%[175]
October 23, 2008	31.22%[176]
October 24, 2008	28.84%[177]

[165] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 8 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[166] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 9 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[167] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 10 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[168] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 11-13 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[169] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 14 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[170] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 15 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[171] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 16 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[172] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 17 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[173] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 18-20 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[174] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 21 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[175] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 22 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[176] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 23 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[177] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 24 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

Flow Date	Percent of Baseload Gas in Total Transport Volume
October 25-27, 2008	36.26%[178]
October 28, 2008	29.70%[179]
October 29, 2008	46.42%[180]
October 30, 2008	29.83%[181]
October 31, 2008	32.58%[182]

This error caused Abrantes-Metz's estimate of the alleged losses associated with "uneconomic transportation" to be overstated by about 70 percent, period-wide.[183]

Opinion No. 549 erred in ignoring this evidence. Opinion No. 549 held:

> As Enforcement Staff points out, BP's argument does not undermine the validity of the methodology used in the "Transport Diff" cell for the purposes of assessing economic flow of gas between Katy and Houston Ship Channel. The profit-maximizing decision to flow gas between these two locations, be it baseload or next-day, should still be based on daily prices. The Texas Team always had the option to turn off transport and sell baseload or next-day gas at Katy, thus removing baseload gas from transport volumes would be inappropriate when assessing whether the Texas Team transport decisions were economic.[184]

This finding was arbitrary and capricious. Baseload volumes are those that were sold (not at *Gas Daily* prices) for the month. Further, the nature of OE's claim—as explained by Abrantes-Metz—was that BP's "scheme" was to use transportation to move additional

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[178] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 25-27 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[179] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 28 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[180] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 29 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[181] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 30 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[182] Ex. OE-13 (Protected), BPL 00146151_Official_Copy.xls, October 31 Tab, cells X14 (Baseload) and X22 (Transport from Katy).

[183] BOE at 66 n.304.

[184] Opinion No. 549 at P 158

supplies of fixed-price natural gas for next-day delivery that were not already scheduled to move into HSC markets. Her "uneconomic transportation" calculations purported to quantify that effect. They did not and do not. Abrantes-Metz improperly aggregated transportation volumes that were sold on a next-day, fixed-price basis (those that were relevant to her claim) with substantial and material volumes that had no relevance to that claim whatsoever. Opinion No. 549's assertion that removing the irrelevant baseload gas calculations would be "inappropriate" is clearly erroneous.[185]

OE's claim was *not* simply that trades and transport in September and October lost money. The claim was that the *magnitude* of the losses warranted an inference of fraudulent intent. The record evidence shows that the magnitude of the alleged losses was improperly and materially overstated in September and October, eliminating any basis in record evidence to warrant an inference of intent.[186]

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[185] *Id*.

[186] Opinion No. 549 disregarded as unimportant Abrantes-Metz's mistake, which she acknowledged, in using the Katy-Ship Sheets to calculate transportation profits and losses because they included transfers among BP affiliates that were not executed on ICE and, as a result, did not affect the Gas Daily index. Opinion No. 549 at P 159. The Katy-Ship Sheets are not P&L records. They are gas balancing reports that traders used to track their beginning of day physical positions. Tr. at 411:22-412:1. Luskie explained that the Katy-Ship Sheets were not transmitted to the accounting department. *Id*. at 752:25-753:2. Product Control calculated P&L in monthly mark-to-market reports. The Texas Team used the "Texas Fun Sheets" to estimate P&L, not the Katy-Ship Sheets. Tr. at 878:1-878.11. Bergin acknowledged that the Katy-Ship Sheets allowed traders to balance positions and communicate with schedulers – not establish P&L. *Id*. at 1641:12-1641:18. Opinion No. 549 and the ID erred in disregarding these facts. Opinion No. 549 at P 159; ID at P 62 n.46. In addition, Abrantes-Metz's analysis of the Katy-Ship Sheets and resulting conclusions improperly included trades that were not executed on ICE and not included in the Gas Daily index. Abrantes-Metz conceded this point at hearing. Tr. at 1938:17-1938:24. Abrantes-Metz acknowledged that the Katy-Ship Sheets contained intrabook transfers in which the counterparty is listed as "asset." She also conceded that an intrabook transfer (a transfer among BP affiliates) could not be executed on ICE. Tr. at 1939:11-1939:21. As a result, Abrantes-Metz conceded that the Katy-Ship Sheets include transactions that were not transacted on ICE for next-day fixed price delivery. Opinion No. 549 wrongly assumes that the same errors might have been made in the same proportions in the Pre-IP period.

d. Opinion No. 549 Erred in Adopting Abrantes-Metz's Inter-Market Analysis.

Like the ID, Opinion No. 549 accepted, with no real analysis, Abrantes-Metz's "inter-market" analysis as a marker of a "scheme."[187]

Abrantes-Metz compared HSC sales prices to what she believed were the analogous alternative trade prices that would have been executed in the Katy markets; she did not compare BP's HSC sales to the price of a trade that could have been executed with certainty.[188] Abrantes-Metz relied on fictitious trades at the Katy offer prices and even acknowledged the fictitious nature of her analysis.[189] For these offer-side comparisons, a trade did not in fact occur at that moment at the Katy offer price. Almost 40 percent of her comparison points involved offers that were not reasonable substitutes or comparison points, because not only were they not executed at the same moment of a comparable HSC trade, they were never executed.[190] Reverting again to the sliding scale of mathematical certainty, Opinion No. 549 affirmed her methodology simply by proclaiming that this was close enough without any authority or reasoning.[191]

Evans provided testimony that the intraday model failed to account for the different and changing market conditions that occurred between the trade that was executed at HSC and the trade that was later executed at Katy in connection with the

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[187] Opinion No. 549 at PP 111-13; ID at P 59.

[188] *See* Ex. BP-037 at 51:22-52:11.

[189] *See* Ex. OE-129 at 115:7-115:10. Abrantes-Metz's testimony recognized that that there was a comparable offer stack at Katy for only 62 percent of the Texas Team's offer-initiated sales at HSC when her analysis considered only the offers that were eventually executed at Katy.

[190] *Id*.

[191] Opinion No. 549 at P 112.

offer-based analysis. Evans addressed this flaw at hearing.[192] Opinion No. 549 failed to address this flaw.

Opinion No. 549 also erred in rejecting, without foundation evidence showing that in the Investigative Period, BP had a lower rate of "uneconomic" trades than in Abrantes-Metz's Pre-Investigative Period, whether the entire day is assessed, or whether the period only after the first Katy trade of the day is assessed.[193] Opinion No. 549 further erred in finding, without providing any reasoned explanation, that "BP's conclusions from a bid-to-bid comparison are less compelling than from an offer-to-offer comparison as BP had control over its offer prices but could only hit bids at prices that other market participants posted."[194] Opinion No. 549 further failed to even recognize, let alone make a rational conclusion regarding, the massive inconsistencies in the results of Abrantes-Metz's offer-to-offer analysis (78 percent uneconomic trading)[195] and her

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[192] Tr. at 2529:13-2530:15.

> If you compare a Houston Ship Channel sale that BP actually did at, say, 7:25 in the morning and the price that it got there to a Katy offer that it did eventually trade, that's a part of her 62 percent at, you know, two minutes later, three minutes later, that's not an equal risk substitute. You take market risk over those minutes after which the BP sale occurred at Houston Ship Channel in fact and the comparison price that did eventually trade but maybe only eventually traded because the market moved, right, and that's why it eventually traded. It would not have traded at the moment BP actually executed its real sale; it just traded seconds, minutes, maybe handful of minutes, afterwards. Again, that's not a risk substitute comparison that says BP could have actually sold there at the moment it chose to transfer risk at Houston Ship Channel.
>
> . . . .
>
> [Abrantes-Metz] has not controlled for a separation of time between which the trade eventually traded, part of her 62 percent, and the time at which actually Houston Ship did trade, and she has not made an adjustment for the risk and the probability that BP wouldn't have gotten a trade off there, which is not equivalent to the probability, which we know is 100 percent, of getting the actual trade they did get off at Houston Ship.

Id.

[193] *See* Ex. BP-037 at 55:3-55:6. Table 11 in Abrantes-Metz's rebuttal testimony also showed that her measure of uneconomic bids went down in the Investigative Period (35 percent Pre-Investigative Period to 34 percent Investigative Period). Ex. OE-211 at 116:12.

[194] Opinion No. 549 at P 113.

[195] Ex. OE-211 at 116:6-8.

bid-to-bid analysis (34 percent).[196] It also ignored the propensity for Abrantes-Metz's model to "manufacture" uneconomic trading signals when there could be no suspicion of uneconomic trading. So, equally, Opinion No. 549 provided no rationale for accepting a model by Abrantes-Metz that finds uneconomic intraday trading 41 percent of the time when there is no reason to believe that *any* uneconomic trades were conducted.[197]

e. Opinion No. 549 Erred in Adopting Abrantes-Metz's Distance Analysis.

Opinion No. 549 erred in rejecting the evidence cited in BP's Brief on Exceptions regarding the deficiencies of Abrantes-Metz's distance analysis.[198] Abrantes-Metz conducted a distance analysis "whereby she computed the difference (i.e., distance) between BP's offer-initiated sales and the best non-BP offer at Houston Ship Channel."[199] As BP noted, she purported to conduct her distance analysis for the period of each day when trading at HSC had begun, but before Katy locations began trading. However, she did not restrict her analysis to transactions prior to the first Katy transaction. The record evidence shows that when her analysis is corrected to include only pre-Katy transactions – as she said she did – the difference is smaller than the penny difference Abrantes-Metz reported.[200] The rationale articulated in Opinion No. 549 is that it does not matter whether the difference was a penny or less. There was a difference and that "is consistent with a manipulative scheme to suppress prices by underpricing the

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196 *Id.* at 116:12.

197 Ex. OE-129 at 121 Table 15.

198 BOE at 37-38.

199 Opinion No. 549 at P 114.

200 *See* Ex. BP-037 at 61:1-3.

next best offer."[201] Opinion No. 549 cited no authority for such a proposition, nor offered logic for how underpricing the next-best offer is anything but rational economic behavior that occurs in competitive markets. Accordingly, this finding is arbitrary and capricious and not based on reasoned decisionmaking.

Opinion No. 549 erred in concluding that even though the "distance" of other market participants was equal to or greater than the $0.018 in the Investigative Period (when the analysis is done correctly), one can still infer manipulative conduct by BP.[202] This conclusion is unsupported, incorrect, and illogical. If manipulative conduct is to be inferred by BP's "distance," how can the similar or greater "distance" of other market participants be irrelevant?

f. Opinion No. 549 Erred in Adopting Abrantes-Metz's Bid-Hitting Analysis.

Opinion No. 549 adopted Abrantes-Metz's conclusion that bid-hitting is "insignificant," except when considered in the context of BP's increased volume during the Investigative Period.[203] However, it ignored evidence showing that BP's increased rate of bid-hitting at HSC during the Investigative Period was not evidence of any scheme.

First, Opinion No. 549 incorrectly rejected evidence that BP's bid-hitting rates were not unusual when compared to a broader time period.[204] It was improper for Abrantes-Metz to base her analysis on a faulty Pre-Investigative Period, and it was error for Opinion No. 549 to sanction such a fundamental error.

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[201] Opinion No. 549 at P 119.

[202] *Id*.

[203] Opinion No. 549 at 126.

[204] *See* Ex. BP-037 at 49:1-7; Tr. at 2489:19-23; Tr. at 2490:16-2492:16.

Opinion No. 549 likewise erred in rejecting evidence that BP's rate of bid-hitting at the Katy locations (which were not alleged to have been manipulated) increased by even more than the increase in BP's bid-hitting rate at HSC.[205] Simply stated, BP offered evidence that its behavior at HSC was consistent with that at other locations where there was no allegation of manipulation. That evidence cannot be ignored simply because it undercuts Abrantes-Metz's opinions.

Opinion No. 549 failed to even address BP's argument that Abrantes-Metz failed to examine the bid-hitting rates of other market participants not accused of a manipulative scheme.[206] The record evidence shows that many other market participants increased their bid-hitting percentage more than BP.[207] The failure to address this evidence, and to recognize that BP's shift was a general shift observed in the market as a whole, was error. It was also error for Opinion No. 549 to simply disregard the record evidence that the increase in BP's bid-hitting was likely driven by its large baseload position, a position for which the Pre-Investigative Period offered no comparable data points.[208]

3. Opinion No. 549 Erred in Approving The Biased Pre-Investigation Period.

Abrantes-Metz asserted that "changed trading patterns during a time period under examination can be one indication of manipulation"[209] and based her conclusions on perceived changed trading and transport patterns by BP during the Investigative Period –

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[205] *See* Ex. BP-037 at 50:14-50:17.

[206] BOE at 37.

[207] Tr. at 2492:5-14; Ex. BP-068.

[208] Opinion No. 549 at P 127.

[209] *Id.* at P 149 (citing Ex. OE-211 at 27-28).

September 18, 2008 through November 25, 2008.[210] In order to find these changed patterns, she compared BP's trading and transport during the Investigative Period with its trading and transport during a "Pre-Investigative Period" of January 2, 2008 through September 10, 2008.[211] The ID adopted this "Pre-Investigative Period" and the conclusions Abrantes-Metz drew from the comparisons.[212] Opinion No. 549 approved, concluding that "[t]he record evidence supports the reasonableness of Enforcement Staff's selection of the Pre-Investigative Period."[213] Opinion No. 549 erred in this conclusion and in rejecting BP's arguments regarding the inappropriateness of the so-called "Pre-Investigative Period."

a. The Pre-Investigative Period Fails to Meet Basic Requirements for a Statistical Analysis.

As the Supreme Court has stated, typical examples of weaknesses in statistical evidence include "small or incomplete data sets and inadequate statistical techniques."[214] Opinion No. 549 acknowledged that "[t]o determine if a change in trading patterns occurred, a control period must be selected during which no known manipulation occurred, but ***which is similar to the suspect period.***"[215] However, the "Pre-Investigative Period" is not at all similar to the Investigative Period and Opinion No. 549 erred in blindly accepting this flawed Pre-Investigative Period.[216]

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210 *Id.* at P 149.

211 *Id.* at P 144.

212 ID at P 42.

213 Opinion No. 549 at P 149.

214 *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 996 (1988) (superseded by statute on other grounds).

215 Opinion No. 549 at P 149 (emphasis added).

216 *Id.* at P 149.

BP demonstrated this fundamental flaw in its Brief on Exceptions. However, Opinion No. 549 either summarily rejected, or simply ignored, BP's arguments and the record evidence that demonstrates the flaws in the Pre-Investigative Period.

The rationale expressed in Opinion No. 549 for approving the ID's use of the Pre-Investigative Period was as follows:

> Comfort executed 89 percent of the Texas Team's fixed price trades at Houston Ship Channel during the Investigative Period. Comfort became the Texas Team's primary Houston Ship Channel trader in January 2008 and also executed 87 percent of the Texas Team's trades at Katy and Houston Ship Channel during the Pre-Investigative Period. These facts provide an evidentiary basis for selecting the Pre-Investigative Period, which also started in January 2008, as the control period.[217]

Thus, the only common factor in the Investigative Period and the Pre-Investigative Period (which is supposed to function as a control) is the presence of Comfort on the Texas Team. This is a time frame selected to support Abrantes-Metz's conclusions rather than to conduct a legitimate unbiased assessment of the evidence.

i. Opinion No. 549 Erred in Not Considering the Effects of Seasonality in Affirming The Pre-Investigative Period.

Particularly surprising is Opinion No. 549's summary rejection of BP's argument that, because the natural gas industry is seasonal, a Pre-Investigative Period would necessarily have to account for that seasonality.[218] Contrary to Opinion No. 549's characterization, BP's argument was neither "unsupported and generalized" nor was it

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[217] Opinion No. 549 at P 150.

[218] *Id.* at P 151 ("We also find the ID reasonably considered the evidence that BP's unsupported and generalized claim of 'seasonality' was insufficient to warrant disregarding Enforcement Staff's Pre-Investigative Period in favor of some alternative comparison period of the same months in prior year.").

"insufficient to warrant disregarding Enforcement Staff's Pre-Investigative Period in favor of some alternative comparison period of the same months in prior years."[219]

The Commission has acknowledged that seasonality is a significant factor in natural gas trading. The Commission's *Energy Primer: A Handbook of Energy Market Basics* contains numerous references to the seasonal nature of the natural gas industry:

- "Demand, however, changes considerably with the seasons;"[220]
- "Weather is the most significant factor affecting seasonal natural gas demand;"[221]
- "Commercial consumers include hotels, restaurants, wholesale and retail stores and government agencies, which use natural gas primarily for heat. Consequently, its demand varies over the seasons, weeks and days;"[222]
- "Storage can mitigate large seasonal price swings by absorbing natural gas during low demand periods and making it available when demand rises."[223]

The Energy Information Administration recognizes this also, discussing the impact of seasonality on gas demand volatility.[224]

Furthermore, there is substantial record evidence regarding the significance of seasonality in the natural gas industry. Evans testified at hearing about the significant impact of seasonality in gas markets and why it is essential to consider comparable

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[219] *Id.* at P 151 and n.292.

[220] FERC, *Energy Primer: A Handbook of Energy Market Basics* at 28 (July 2015), *available at* www ferc.gov/market-oversight/guide/energy-primer.pdf.

[221] *Id*. at 7.

[222] *Id*. at 10.

[223] *Id*. at 31

[224] *See* U.S. Energy Information Administration, Natural Gas Year-In-Review 2008 at 4, *available at* http://www.eia.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngyir2008/ngyir2008.html.

months when examining the Texas Team's trading in the Investigative Period.[225] OE's other witness, Dr. Ehud Ronn ("Ronn"), published an article in 2004 that evaluated the seasonality impact on natural gas prices.[226]

In rejecting BP's seasonality argument, Opinion No. 549 relied on Bergin's testimony that "the mere presence of a particular season does not guide trading behavior and or transport utilization" and Luskie's testimony that "the spread is what dictates whether you flow or not flow, the real-time spread."[227] However, Bergin did acknowledge that "traders and particularly marketers like BP are simply trading ***in response to pricing incentives that may be the result of that particular season***."[228] Furthermore, Luskie was testifying about the use of transport generally and was not addressing the seasonal nature of the natural gas industry or the need to compare behavior in one period against behavior in a similar period.

ii. Opinion No. 549 Erred in Rejecting the Record Evidence of the Flaws in the Pre-Investigative Period.

In its Brief on Exceptions, BP provided a detailed analysis of the flaws in the ID's Pre-Investigative Period and how four of Abrantes-Metz's so-called "changed trading patterns" on which the ID relied were wholly consistent when compared to similar months over a longer timeframe.[229] Opinion No. 549 failed to address any of these.

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[225] Tr. at 2483-2484. Evans testified at length, drawing on his experience analyzing gas markets, and specifically during the Investigative Period while with Barclays, about how summer and winter months differ in gas markets.

[226] Ex. OE-156; *see also* "Valuation of Commodity-Based 'Swing' Options" (with P. Jaillet and S. Tompaidis), Management Science, 2004 (Preliminary draft of part I published in Energy & Power Risk Management, Vol. 3, No. 3, June 1998, pp. 14-16 and part II in July 1998 issue, pp. 28-29).

[227] Opinion No. 549 at P 151 n.292.

[228] Ex. OE-161 at 39:17-18 (emphasis added).

[229] BOE at 46.

As an initial matter, Abrantes-Metz made unsupported statements regarding the comparability of data prior to 2008. As Opinion No. 549 pointed out, Abrantes-Metz stated that "natural gas markets looked very different prior to 2008, and including this data in the analysis would have skewed the results."[230] Abrantes-Metz provided no statistical or evidentiary basis for this statement, despite the ID's apparent requirements for such evidence, and provided no details of these "skewed" results that follow from the inclusion of this period.[231] To the extent that these unsubstantiated "skewed" results work in favor of BP, as is likely the case based on the details of the pre-2008 period discussed below, Opinion No. 549 erred by allowing biased expert analyses to be given "substantial weight" without consistency or logic.[232]

First, BP demonstrated that Abrantes-Metz's selective Pre-Investigative Period misrepresents BP's historical HPL transport utilization.[233] Her analysis was limited to information contained in the Katy-Ship sheets rather than using available longer-term HPL transport data.[234] Yet, Evans demonstrated at hearing that the HPL data is just as reliable as the Katy-Ship sheet data in illustrating seasonal shifts in transportation and that mutual changes through time across the data reflected in the HPL data and the Katy-Ship sheets indicate that the HPL data would be a reliable indicator of transport utilization for a period when Katy-Ship sheet data is unavailable.[235] Notwithstanding

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230 Opinion No. 549 at P 145; ID at P 44 n.20 (citing Ex. OE-129 at 38 n.24).

231 *See* OE-129 at 30:11 n.24.

232 Opinion No. 549 at P 212.

233 *See* Ex. BP-037 at 39:17-41:4; Tr. at 2506:10-2507:5.

234 *See* Ex. OE-211 at 38:18-39:10.

235 Tr. at 2508:4-2508:13.

available reliable data, Abrantes-Metz neither analyzed a wider timeframe nor prepared a "stronger analysis" based on more data.[236] Opinion No. 549 ignored this.

Second, BP demonstrated that Abrantes-Metz's selective Pre-Investigative Period allows OE to misrepresent BP's historical fixed-price sales performance. BP's fixed-price trading during the Investigative Period was not a departure from prior and subsequent years. The record reflects this fact and Evans testified concerning it.[237] The evidence made clear that BP's fixed-price sales during the Investigative Period were entirely consistent with BP's fixed-price sales at various points in 2006, 2007, 2009, 2010, and 2011.[238]

Third, BP demonstrated that Abrantes-Metz's selective Pre-Investigative Period allows OE to misrepresent BP's historical bid-hitting rate. During the Investigative Period, BP's bid-hitting rate at HSC was 63 percent. BP's bid-hitting rate at HSC was similar or higher in numerous other periods.[239]

Fourth, BP demonstrated that its timing of trades at HSC (*i.e.*, OE's "earliness" allegations) during the Investigative Period was comparable to its historical timing of trades. Although Abrantes-Metz argued that "a pattern of early and heavy fixed-price

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[236] Tr. at 1931:9-1933:16; Tr. at 2609:13-2609:20.

[237] Evans testified, on a longer run history, as shown on Exhibit 1 of BP-037, that it was not unusual for BP to have traded 90 percent, 95 percent, or 100 percent of its sales at HSC on a fixed-price basis. *See* Ex. BP-037 at 19:1-19:5.

[238] *Id.*

[239] Evans showed that these periods include: (i) January – April 2006; (ii) January – April 2008; (iii) September 2009 – January 2010; and (iv) October 2010 – October 2011. *See* Ex. BP-037 at 49:4-49:7.

selling at HSC is [] apparent when reviewing the first three trades of the day," BP's data rebutted that argument.[240]

Opinion No. 549 noted that Abrantes-Metz "extended several of her analyses, including her timing analysis, by using data from previous years . . . ."[241] In rebuttal testimony, Abrantes-Metz revised her limited Pre-Investigative Period to consider data dating back to 2007 for **some** of her analyses. However, even those analyses demonstrate that the Texas Team's trading in the Investigative Period was consistent with its trading in prior periods.

Table 1.A of Abrantes-Metz's rebuttal testimony showed that BP's trading at HSC during the Investigative Period was similar to its trading in 2007 with respect to numerous metrics on which the ID relied in finding liability for a manipulative "scheme."[242]

- The Texas Team's average daily volume of sales at HSC during the Investigative Period was comparable to January, April, and November 2007.
- The difference in the Texas Team's average daily volume of sales at HSC and Katy in the Investigative Period was comparable to January, April, and September 2007.
- The Texas Team's market share at HSC during the first five minutes of trading in the Investigative Period was *less than* its market share in March, July, August, September, and October 2007.
- The Texas Team's sales market share at HSC during the first five minutes of trading in the Investigative Period was comparable to or less than its sales market share in April, August, and September 2007.

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[240] In 53 of the 72 months in the period from January 2006 to December 2011, the percentage of days during which BP was among the first three trades at HSC was greater than 50%, and the rate was 90% or higher in eight of those months. Ex. BP-037 at 23:1-23:4.

[241] Opinion No. 549 at P 150.

[242] Ex. OE-211 at 20.

- The percentage of days in which the Texas Team made one of the first three sales at HSC during the Investigative Period was comparable to or less than the percentage of days in January, April, August, and September 2007.

- The average number of minutes that elapsed between the first trade at HSC and when the Texas team made its first sale at HSC during the Investigative Period was comparable or more than the average number of minutes in January, April, and September 2007.

- The average number of minutes between the first trade at HSC and all sales at HSC during the Investigative Period was comparable to the average number of minutes in January, July, and August 2007 as well as February 2008.

- The average daily transport volume that the Texas Team utilized on HPL during the Investigative Period was comparable or less than the average daily volume in February, March, September, and October 2007. Notably, September and October of 2007 were the most recent seasonally-comparable comparison months for the Investigative Period months of September and October of 2008.

All of the foregoing show that Abrantes-Metz's "confluence of trading behaviors" theory has no basis in fact. Opinion No. 549 erred in ignoring all this and in approving her theory as evidence of both an intent to manipulate and actual manipulation.[243]

4. Opinion No. 549 Erred in Rejecting Evidence of Non-Manipulative Explanations.

The record evidence shows that: (1) the 2008 financial crisis and subsequent credit issues affected the creditworthiness of potential counterparties; (2) Hurricanes Ike and Gustav materially affected natural gas markets in and around HSC; and (3) both of these events affected the Texas Team's trading during the Investigative Period. The ID ignored this evidence and Opinion No. 549 erred in concluding that the ID "considered, and reasonably rejected" this evidence.[244]

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[243] Opinion No. 549 at P 225.

[244] *Id.* at P 171.

With respect to the financial crisis, the record evidence includes a September 19, 2008, *Gas Daily* article describing the impacts of the financial crisis, noting that "[t]he nation's worsening financial crisis spooked North American gas traders Thursday as some began cutting off investment banks as counterparties."[245] The record evidence also includes contemporaneous internal BP communications instructing that traders were to refer transactions with certain parties to the credit department prior to executing trades with those parties and that credit limits for some market participants trading on the Intercontinental Exchange ("ICE") were reduced to a level that effectively precluded the Texas Team from transacting with them.[246] The record evidence also includes testimony that companies were canceling contracts and that counterparties were losing credit ratings and thus unable to meet credit standards.[247]

There is also ample evidence in the record that Hurricanes Ike and Gustav affected the natural gas markets around HSC and the Texas Team's trading.[248] *Gas Daily* reported on September 19, 2008 that "Ike, which plowed through the Gulf of Mexico before hitting Galveston Friday night, shut in an estimated 5.7 Bcf of gas production in the six days since it came ashore and temporarily destroyed even more demand as evidenced by a 67-Bcf build to storage."[249] Likewise, daily situation reports issued by the Department of Energy during the Investigative Period also describe the substantial

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[245] Ex. BP-056 at 11 (Public Version).

[246] Ex. BP-023

[247] Ex. BP-020 at 10:21-11:3.

[248] *See* Ex. BP-013 at 22 ("The relevant period was one of the most volatile and uncertain periods in market history, with a substantial natural gas price decline, physical disruptions due to Hurricanes Gustav and Ike, changes in market liquidity related to these factors and the financial crisis and the loss of significant market participants.").

[249] *See* Ex. BP-056 at 19 (Public Version).

impact that Hurricanes Ike and Gustav had on market conditions at that time. For example, the October 9 situation report states that 38.6 percent of pre-event natural gas production remained shut-in almost three weeks after Hurricanes Gustav and Ike.[250]

September 19, 2008 is the date of the largest single one-day loss in the entire Investigative Period. Contemporaneous documents from the Investigative Period also demonstrate that changing market conditions affected BP's trading activity. On September 29, 2008, Luskie transmitted a communication to Barnhart and Comfort that explained during the week following Hurricane Ike, approximately 305,000 MMBtu was offline and only a fraction was able to be cut due to force majeure.[251] At hearing, Bergin confirmed the accuracy of the assertions in that communication.[252]

Barnhart testified that the impact of Hurricane Ike prompted BP to "deal with numerous cuts, outages, and parties invoking the force majeure provisions of their contracts."[253] Barnhart also testified that Hurricane Ike affected her trading in September 2008.[254] Due to Hurricane Ike and the invocation of force majeure provisions, the Texas Team portfolio became longer.[255]

At hearing, Bergin conceded that Hurricane Ike created impacts through at least September 2008. Bergin testified:

> Q. Do you agree, Mr. Bergin, that in this e-mail Mr. Comfort notes ongoing market destruction affecting BP markets?

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250 *See* Ex. BP-058 at 313.

251 *See* Ex. BP-064 (Public Version).

252 Tr. at 1656:2-1656:12.

253 *See* Ex. BP-020 at 10:6-10:7; *see also* Ex. OE-192.

254 Tr. at 905:1-905:4.

255 *See* Ex. BP-020 at 16:8-16:10; Tr. at 912:23-913:6.

A. He says -- up here, he talks about the Texas Gulf Coast market remains substantially diminished.

Q. What does it mean for a market to be "substantially diminished"?

A. I can't know exactly what he means, but if I'm just going to interpret what he says, it would be that the market, market for gas demand in the Texas Gulf Coast area would be diminished, would be less than average, less than normal, is likely what he meant by that.

Q. And continuing through the chain, Mr. Comfort doesn't just talk about constraints on the HPL pipeline itself; he talks about the impact of the hurricane on the markets that BP served in and around the Houston Ship Channel. Correct?

A. He lists markets in and around Houston Ship Channel that look like they've either gone down completely or have gone down in part.

Q. Right. Those markets include -- he lists market problems, BP markets, the Texas City refinery, BP Green Power, numerous industrials, Air Liquide, Exxon Baytown. Is that in the Houston Ship Channel area, Mr. Bergin?

A. It is.

Q. Conoco, Conoco actually has refining facilities in that region, does it not?

A. I'm not going to disagree with you. I think Conoco has – they've got some down in Corpus, too. I don't know if they have a specific refinery in the Ship Channel area.

Q. And generally, we would refer to this using the term "demand destruction," this sort of problem?

A. That's a term that you would hear used, yes.

Q. Fair enough. And the conditions that Mr. Comfort notes on the demand destruction side – I'm not talking about the HPL pipeline -- those conditions continued to some extent after September 18th; correct?

A. Yes, they did.

Q. So you don't really disagree that in the aftermath of Hurricane Ike BP experienced demand destruction in and around the Houston Ship Channel region; correct?

A. That's correct.

. . . .

Q. The dispute, when we're talking about the month of September, we're not really disagreeing with one another, BP and Staff through you, that there was demand destruction from September 18th through the end of the month of September. We agree on that, don't we?

A. You can see in the Katy-Ship sheets that they lost baseload market shortly after the hurricane. You saw some supply come off for about three days at Katy as well. Then Katy supply came back, and the -- BP's physical -- those baseload markets, they didn't really come back. So I agree with that, yes.

Q. So as a result, BP had gas at Katy which it had thought it had a market for at Ship Channel, and that market dried up; right?

A. That baseload market went away, I agree.

Q. You can see that on the Katy-Ship Excel sheets, because that's labeled as the baseload volume at HSC; correct?

A. That's right.

Q. ***So the real issue becomes not that the hurricane didn't have an impact in September. We agree it did. And the impact was demand destruction at Houston Ship Channel; correct?***

A. ***Yes, that was one impact, correct.***[256]

Although OE previously acknowledged that Hurricane Ike affected natural gas markets,[257] its experts failed to consider the impact that the hurricanes and the financial crisis had on BP's trading activity. Abrantes-Metz admitted that she did not "examine the behaviors of natural gas traders and changes to those behaviors under various

[256] Tr. at 1646:11-1649:21 (emphasis added).

[257] *See* Ex. BP-003 at 12 (Public Version).

different risk positions and market conditions."[258] Bergin testified that he did not conduct any specific analysis of the impact of Hurricane Ike on production facilities in Texas.[259]

The ID ignored the record evidence and the failure of OE's experts to consider that evidence, and Opinion No. 549 erred in affirming the ID's conclusion.

5. Opinion No. 549 Failed to Explain its Improper Wholesale Disregard of BP Expert Evans' Testimony Based on "Credibility."

As a preliminary matter, Opinion No. 549 incorrectly said that BP "does not take issue with" the ID's determination not to afford Evans' testimony any weight because Evans' testimony contradicted other BP witnesses and that he "did not disprove" OE's allegations. Notwithstanding the fact that Evans had no burden to prove alternative explanations,[260] BP did, and does, take issue with Opinion No. 549's erroneous conclusions. That is why it raised the issues in its Brief on Exceptions. But Opinion No. 549 failed meaningfully to address BP's arguments on exceptions that the ID erred in overlooking Evans' significant experience in physical natural gas markets and Abrantes-Metz's and Bergin's inadequate experience in those same markets.[261]

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[258] Tr. at 1869:7-11.

[259] Tr. at 1641:19-1642:14.

[260] *Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992)

> "Defendant need not prove another cause, he only has to convince the trier of fact that the alleged negligence was not the legal cause of the injury. In proving such a case, a defendant may produce other 'possible' causes of the plaintiff's injury. These other possible causes need not be proved with certainty or more probably than not. To fashion such a rule would unduly tie a defendant's hand in rebutting a plaintiff's case, where, as here, plaintiff's expert testifies that no other cause could have caused plaintiff's injury."

(citation omitted).

[261] Opinion No. 549 at PP 149-51, 182, 184-85; *see* BOE at 54-60.

No material direct evidence of an intent to manipulate exists (the defects in the "consciousness of guilt theory" are all addressed below). OE tries to meet its burden by arguing that a changed pattern of trading *can only* be explained by *one* factor: manipulation. As a qualified expert with actual experience in the natural gas industry, Evans challenged this inference by: (a) showing that there were no changes in trading; (b) showing that OE has tried to manufacture evidence of a change by using an unrepresentative "Pre-IP"; and (c) identifying causes other than manipulation for the alleged changes cited by OE witnesses.

Opinion No. 549 wrongly refused to give Evans' testimony any weight because his testimony allegedly contradicted that of other BP witnesses. First, the testimony was not contradictory. Opinion No. 549 asserted three purported contradictions with Luskie's testimony that "provide substantial support for the ID's credibility determination."

> As the ID notes, BP's traders contradicted Evans's descriptions of natural gas market trading at least three times. First, Evans claimed that a trader would consider a market with a wide bid/offer spread to be a viable comparison to a market with a narrow spread, but Luskie disagreed. Second, Luskie acknowledged that BP's Texas Team traders measured their next-day fixed-price P&L at Houston Ship Channel and Katy against each location's *Gas Daily* index price, which contradicted Evans's assertion that measuring P&L against the *Gas Daily* index is only relevant when a trader sells gas that was purchased at an index price, and is otherwise insufficient for any other aspect of a trader's book. Third, Evans claimed that offers at Katy were irrelevant when he criticized Abrantes-Metz's inter-market comparison of the Texas Team's Houston Ship Channel sales with contemporaneous bids and offers at Katy. However, Luskie testified that he considered both

> bids and offers when deciding whether and where to trade.[262]

Each of these assertions is incorrect and does not provide a basis to reject Evans' testimony.

For the first purported contradiction, Opinion No. 549 and the ID mischaracterized Evans' testimony. Discussing a hypothetical provided by OE that included a Katy spread of 30 cents and a best bid at Katy of $6.20, Evans stated: "assuming the HSC market was tighter, there's very good reason why you would go to the HSC market and not go and try to sell in the Katy market."[263] In addition, OE questioned whether, in this same hypothetical, Evans "would be comparing an HSC sale against a Katy bid price when the bid/offer spread at Katy was 30 cents and there had not yet been a Katy trade."[264] Responding affirmatively, Evans explained that it made "good sense why, if the sale price that was available at Houston Ship Channel . . . is 6.30 or 6.25, that if you're going to make a sale, it makes a lot more sense to do it here than at Katy at [a price of] 6.20."[265]

Luskie did not disagree. OE provided completely different facts when it questioned him about the following "pure arbitrage" hypothetical: "the current HSC bid/offer spread is $5.99 @ 6.01. No next-day fixed-price trades have been made at

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[262] Opinion No. 549 at P 177 (footnotes omitted).

[263] Tr. 2622:3-5; *see* Tr. at 2621:12-26; 2622:1-5.

[264] Tr. at 2622:18-20.

[265] Tr. at 2622:21-25.

Katy. The current Katy bid/offer spread is 5.90 @ 6.10."[266] Responding to this distinct hypothetical, Luskie stated that the Katy spread was too wide to determine the value.[267]

Opinion No. 549 also misconstrued the second alleged contradiction between Evans' and Luskie's testimonies regarding the relevancy of measuring P&L against the Gas Daily index price. The opinion omitted Evans' elaboration that "[i]f you have any other aspect of your book that's driven by fixed price transportation, these are places where the P&L against the index would be grossly insufficient to accurately describe P&L."[268]

In addition, Opinion No. 549 wholly mischaracterized Evans' testimony underlying the third purported contradiction. In identifying the flaws in Abrantes-Metz's inter-market comparison, Evans never stated that Katy offers were irrelevant. In fact, he agreed that "it is reasonable to examine pricing alternatives in the instant, and compare the price of a sale BP made at HSC against the contemporaneous price that could have been achieved at the same moment at a Katy location to effectuate price risk transfer."[269] Instead, and in contrast to Opinion No. 549's inaccurate description, Evans critiqued Abrantes-Metz's error in comparing HSC prices "that were *actually* acted upon" to Katy market prices "upon which *no one* was acting."[270] Because no Katy buyers were willing to pay a higher price for natural gas at Katy at the same time that they purchased gas at HSC, Evans emphasized, "no simultaneous price risk transfer would have occurred."[271]

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266 Tr. at 706:1-5; 585:1-4.

267 Tr. at 707:1-11.

268 Tr. at 2538:8-11.

269 Ex. BP-037 at 51:19-22.

270 Ex. BP-037 at 52:5-7 (emphasis in original).

271 Ex. BP-037 at 52:8-9.

Evans reasoned that Abrantes-Metz's attempt to cure this, by using Katy offers subsequently executed, failed to recognize the risk inherent in waiting to be filled at the Katy offer price.[272] Therefore, none of the reasons offered by Opinion No. 549 for totally disregarding Evans' testimony have merit.

But even if Evans' testimony had been contradictory (and it was not), disregarding his testimony in its entirety would still constitute unreasoned decisionmaking for at least two reasons: (a) rejecting one portion of testimony as not credible does not support wholesale rejection of the rest of the testimony, and (b) applying a standard that demands wholesale rejection of Evans' testimony on the basis of a few purported inconsistencies with other BP witnesses would equally require the rejection of the entirety of Bergin's and Abrantes-Metz's testimonies, which are deeply and broadly contradictory to OE witnesses. For example, as stated earlier, Luskie unambiguously stated that "the spread is what dictates whether you flow or not flow, the real-time spread." This testimony flatly contradicts both Bergin's "transport P&L" analysis relying on *Gas Daily* prices, and Abrantes-Metz's daily pipeline utilization regression analysis relying on the same. This, in turn, would lead to "no weight" being afforded to any of their analyses if this approach were applied consistently to all experts, not just Evans.

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[272] Moreover, Evans emphasized, the risk raised by waiting is evident "by the fact that Abrantes-Metz has found many cases where the Katy offer used in the unadjusted method was never eventually executed." Ex. BP-037 at 52:17-19.

a. Rejecting One Portion of Testimony as Not Credible Does Not Support Rejection of the Testimony in its Entirety.

The Commission may not ignore BP's arguments or brush them aside based upon conclusory assertions of lack of credibility. And "[u]nless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned."[273] The Commission's decision must be discernibly "rational and based upon conscious choice" and must "disclose the basis of its order" after "mak[ing] findings that support its decision . . . [that are] supported by substantial evidence."[274] It will not do for Opinion No. 549 to broadly punt to the ALJ's reasoning and credibility determinations. It is black letter law that "administrative adjudicators must justify their credibility determinations" and that "the more central to the final determination the credibility determination is, the more the adjudicator must justify the decision to credit selected witnesses or the weight it gave to the certain testimony."[275] Evans' testimony is central to the case, particularly given the "confluence of factors" theory on which OE's case rests. To give it no weight was error.

Opinion No. 549's explanation for accepting the testimonies of Abrantes-Metz and Bergin in their entirety while rejecting Evans' testimony in its entirety lacked a reasoned basis and was inadequately explained. As in *Chao v. Gunite Corporation*, "[h]ere, the Commission's opinion suggests less an evaluation of the witnesses' testimony and more 'an utter disregard for uncontroverted sworn testimony' and other

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[273] *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) (reversing remanding).

[274] *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-68 (1962) (declining to defer to an agency that failed to meet this standard) (internal quotation marks and citation omitted).

[275] Koch, Charles H. Jr., 4 ADMIN. L. & PRAC. § 11:24 (3d ed. Feb. 2016).

evidence presented . . . ."[276] There must be an "accurate and logical bridge . . . between the evidence in the record and the credibility determination about expert testimony."[277]

The only purported contradictions to which Opinion No. 549 pointed concern Luskie's testimony. As shown above, there are no such contradictions. The three purported contradictions fall into two categories: (1) how Luskie thought about bids and offers (the first and third purported contradiction); and (2) how Luskie thought about profits and losses (the second purported contradiction). These purported contradictions are isolated to Evans' testimony vis-à-vis Luskie. They do not implicate any of the holes that Evans punched in the analysis of Abrantes-Metz, where he showed her analysis to be unreliable and unreasoned. Accordingly, Opinion No. 549 did not and could not offer "an accurate and logical bridge" between the purported contradictions with Luskie's testimony and the refusal to afford any of Evans' testimony any weight.[278] There is no such bridge. If Opinion No. 549 had been the result of reasoned decisionmaking, it would have afforded Evans' testimony weight and required Abrantes-Metz to adequately support her assertions. By failing to do so, Opinion No. 549 erred.

b. Opinion No. 549 Erroneously Gave Substantial Weight to "Expert Testimony" on the Subjective Intent of BP Traders.

Opinion No. 549 erred in accepting Abrantes-Metz's and Bergin's testimonies regarding BP's and its traders' motives and intent. Courts routinely exclude expert

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[276] *Chao v. Gunite Corporation*, 442 F.3d 550, 559 (7th Cir. 2006).

[277] *Id*.

[278] *See supra* section IV.B.5.

testimony regarding third party intent or motive as impermissibly speculative.[279] Granting such improper testimony any weight at all is material error. Lacking evidence of any intent to manipulate, OE witnesses Bergin and Abrantes-Metz testified about the subjective intent of BP personnel.[280] Opinion No. 549 erroneously gave material weight to this unsupported "expert" speculation about subjective intent.

c. Opinion No. 549 Failed Meaningfully to Consider the Experiences of BP's Witnesses and Staff's Witnesses.

Opinion No. 549 erred in rejecting BP's extensive arguments on exceptions that the ID failed to consider Evans' experience and in disregarding that Abrantes-Metz and

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[279] *See*, *e.g.*, *U.S. v. Bennett*, 161 F.3d 171, 183 (3rd Cir. 1998) (finding district judge properly excluded expert witness testimony regarding whether defendant had the intent to defraud because it goes beyond merely assisting the trier of fact); *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (holding district judge erred by allowing expert witness to testify about the motive of GM for reducing the padding in its sun visors because he "lacked any scientific basis for an opinion about the motives" of the manufacturer, and explaining that"[h]e could give an opinion as an engineer that reducing the padding saved a particular amount of money; he might testify as an engineer that GM's explanation for the decision was not sound (from which the jury might infer that money was the real reason); but he could not testify *as an expert* that GM had a particular motive.); *Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997) (stating that expert testimony regarding an individual's state of mind "gives the false impression that he knows the answer to this inquiry" and is therefore "unhelpful to the trier of fact"); *Kruszka v. Novartis Pharm. Corp.*, 28 F. Supp. 3d 920, 931 (D. Minn. 2014) (expert witness "may not proffer an opinion relating to what individuals ... thought with respect to certain documents or about their motivations."); *Siring v. Or. Board of Higher Educ.*, 927 F. Supp. 2d 1069, 1077-78 (D. Or. 2013) (noting that "[c]ourts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind" and holding that expert "may not opine about the intent, motive, or state of mind of the EOU decisionmakers, the unexpressed reasons for their decisions, or what they may have been thinking"); *In re Fosamax Products Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009) (barring expert witness testimony on knowledge, motivations, intent, state of mind, and purposes of defendants because it is conjectural given that the expert's "expertise does not give her the ability to read minds"); *In re Rezulin Products Liab. Litig.*, 309 F.Supp.2d 531, 546 (S.D.N.Y. 2004) ("the opinions of [expert] witnesses on the intent, motives, or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise"); *see also Johnson v. Wyeth LLC*, 2012 WL 1204081, at *3 (D. Ariz. 2012) (holding experts "may not offer opinions concerning defendants' motive, intent, knowledge, or other state of mind"); *Baldonado v. Wyeth*, 2012 WL 1802066, at *8 (N.D. Ill. 2012) (concluding that expert witness may not testify about defendant's "internal motivations" without personal knowledge because such testimony would be improper speculation); *U.S. Gypsum Co. v. Lafarge North America Inc.*, 670 F. Supp. 2d 768, 775 (N.D. Ill. 2009) ("There is nothing before the court to suggest that [the expert] is particularly qualified to understand the mental attitudes of others. Even assuming he were, he is able to render an opinion on intent only by drawing inferences from the evidence. Such opinions merely substitute the inferences of the expert for those the jury can draw on its own.") *and Smith v. Wyeth-Ayerst Laboratories Co.*, 279 F. Supp. 2d 684, 700 (W.D.N.C. 2003) (holding expert witness testimony about "corporate intent" is inadmissible).

[280] *See, e.g.*, Ex. OE-129 at 3, 49:15-17, 78-79; ID at PP 116-17.

Bergin lacked sufficient (or, in the case of Abrantes-Metz, any) experience in natural gas markets to qualify as experts.[281] Emphasizing that "[e]xperience counts," BP asserted on exceptions that Evans was the only witness in the proceeding "with any experience with claims of manipulation in the natural gas industry" and that he "has both deep relevant practical experience and sophisticated training."[282]

Abrantes-Metz possesses no relevant experience. The ID erred in finding, and Opinion No. 549 wrongly concurred, that her testimony warranted significant weight. As argued on exceptions, Abrantes-Metz has no experience or expertise in natural gas markets.[283] In fact, she acknowledged that she has never before testified in any case in the United States related to purported manipulation of either natural gas or power markets. She admitted that her natural gas experience is limited solely to a two week assignment, over six years ago, as one member of another firm's consulting team. Moreover, Abrantes-Metz had not analyzed physical natural gas trading data before this proceeding.[284]

Due to this lack of experience, Abrantes-Metz was and is unqualified to testify about physical natural gas markets. The ID and Opinion No. 549 erred in not only affording her testimony substantial weight, but in wholesale adopting her testimony in instances where it diverged from Evans' testimony. For example, Abrantes-Metz lacked adequate experience to testify about seasonality in the natural gas markets.[285] However, the decisions concluded that her testimony on this issue adequately rebutted Evans'

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[281] Opinion No. 549 at PP 149-51, 182, 184; *see* BOE at 54-60.

[282] BOE at 4.

[283] *Id.* at 60.

[284] *Id.* at 60.

[285] *Id.* at 44-45.

seasonality findings.[286] In addition, she asserted without any support or explanation that "the natural gas markets looked very different prior to 2008," and concluded without reason that the markets in the fall of 2008 were similar to the earlier months in 2008 that she used for her Pre-Investigative Period.[287]

Also lacking sufficient experience, Bergin has not traded physical natural gas nor managed anyone trading physical natural gas since 2006.[288] Moreover, his work did not involve HPL transport since between 1996 and the early 2000s.[289] Bergin also lacks any specific recollections about the 2008 market conditions related to HSC in 2008.[290] While Bergin testified on compliance issues, his only prior compliance experience was being a subject of two wash trading probes.[291] Failing to adequately consider this inexperience, the ID and Opinion No. 549 erred in relying on his testimony.[292]

C. The ID and Opinion No. 549 Erred by Improperly Presuming Manipulative Intent.

Opinion No. 549 and the ID erred in concluding that BP intended to engage in a manipulative scheme. The opinion and ID based their intent findings on unwarranted inferences and OE's incorrect data.

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286 Opinion No. 549 at PP 61, 179.

287 BOE at 45.

288 Tr. at 1546:8-1546:13.

289 Tr. at 1546:14-1546:23.

290 Tr. at 1547:13-1547:17.

291 Tr. at 1555:8 to 1559:14.

292 BOE at 58-59.

1. The ID and Opinion No. 549 Evidence Does Not Support the ID's Reliance on the Contemporaneous Communications at Issue in this Proceeding.

Commissioner Clark has recognized the importance in an enforcement action of a record demonstrating clear intent, in which OE's theory is confirmed with contemporaneous communications.[293] Both Opinion No. 549 and the ID found manipulative intent based on one recorded and two unrecorded telephone calls. [294] The recorded call actually contradicts Opinion No. 549's conclusions. For the two unrecorded calls, no one can recall any details.[295] Opinion No. 549 and the ID also erred in ignoring other evidence that undermines OE's theory.

2. The November 5, 2008 Recorded Call Contradicts the Conclusions of Opinion No. 549 and the ID.

The November 5, 2008 recorded call contradicts the findings of Opinion No. 549 and the ID concerning manipulative intent. In contrast to OE's theory and Opinion No. 549's and ID's findings, that call did not describe a manipulative scheme executed by the Texas Team.[296]

OE alleged that this one recorded telephone call establishes a manipulative scheme and manipulative intent. Opinion No. 549 and the ID, in turn, erred in adopting this theory, disregarding: (i) the context of the phone call; (ii) a simultaneous and related communication; and (iii) the participants' testimony.

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[293] *See Maxim Power Corp.*, 151 FERC ¶ 61,094 (2015) (Clark, dissenting).

[294] ID at P 100; Opinion No. 549 at P 205.

[295] ID at P 102; Opinion No. 549 at P 274.

[296] ID at P 103 (citing to the ID's "conduct" discussion when deciding that the November 5, 2008 call revealed a "specific strategy at HSC in the IP.").

On October 31, 2008, the Texas Team noticed that a third party was entering into trades late in the trading session, which raised the *Gas Daily* average price by about ten cents.[297] The evidence verifies that Texas Team believed that these third party activities reflected an attempt to engage in physical-for-financial price manipulation.[298]

Luskie called Comfort on November 5, 2008 to recount his discussion with James Parker ("Parker").[299] Luskie noted that during the conversation he had inaccurately described the Texas Team's strategy in a way that made it sound like the "exact same thing that we're sort of accusing [the third party involved in the October 31, 2008 trades] of currently."[300] Comfort testified that this analogy was wrong and inappropriate, upsetting him and leading to a later discussion in which he relayed his displeasure to Luskie.[301]

OE argued that Luskie described the "scheme" in this November 5 recorded call. However, no evidence supports this. The elements of OE's claim are not in any way referenced in the call (*i.e.*, hitting bids, net selling, increasing offer distance, and early trading).

Moreover, it is not clear what Luskie initially said to Parker. In a contemporaneous call, Parker stated that Luskie told him about turning off his transport

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[297] Tr. at 369:1-25.

[298] Ex. BP-040. As BP counsel explained at the hearing, Exhibit BP-040 is a four-page document comprised of a transmittal letter from BP counsel to Robert Pease, then-Director of Investigations of FERC, dated December 12, 2008, and was the first production of BP to OE in this case. *See* Tr. at 747:11-747:23. Attached therewith is ICE Data from October 31, 2008 regarding the HSC Hub, which sets forth the trading data underlying the behavior that the Texas team observed and that Luskie described on the November 5 recorded call.

[299] At the time, Parker was a BP executive. The exchange took place at a BP Assessed Traders Course.

[300] Ex. OE-162 at 3:15-3:18. The third party is named in the protected version of Exhibit OE-162, but in light of its protected status, BP did not name that third party in its publicly-filed Brief on Exceptions.

[301] Tr. at 1210:3-1212:11.

to benefit a cash position.[302] This is the opposite of what OE asserted – that BP increased its use of transport to benefit a cash-settled financial position.

Opinion No. 549 and the ID ignored Luskie's mention of the third party's strategy and the fact that the Texas Team noticed that third party's behavior only days earlier. In addition, the decisions disregarded the most crucial statement from the November 5 recorded call – that Luskie had inaccurately described the Texas Team's trading to Parker.[303] The ID erred in concluding, and the opinion wrongly agreed, that this explanation is "contrary to the record evidence in this case."[304] The transcript of the call establishes Luskie's immediate realization that his description of the Texas Team's trading was wrong.[305] Luskie reiterated in both his pre-filed testimony[306] and at hearing[307] that he incorrectly described the trading to Parker. Opinion No. 549 and ID based their "evidence" of intent on OE's flawed trading analysis.

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[302] *See* Ex. BP-029 at 4 ("[W]e talked about cash optimization, and then [Mr. Luskie] started going on about how you could help your cash position by not flowing your transport.") (emphasis added).

[303] ID at P 104; Opinion No. 549 at P 270.

[304] ID at P 104; Opinion No. 549 at P 270.

[305] Ex. OE-162 at 3:15-3:17 ("Which as I was explaining, I realized that's not right and that's the exact same thing that we're sort of accusing [Redacted] of currently.").

[306] Ex. BP-016 at 8:11-8:14 ("I called Gradyn Comfort, who was a Senior Trader on the South Texas Team. I realized that I had mischaracterized the desk's activities. I called Gradyn because I was in a panic about the conversation I had with Mr. Parker and because I had spoken incorrectly.").

> Q. What did you mean by "I realized was not right"? A. I meant that I knew we were not doing this. I was trying to impress Mr. Parker, and I knew I said something stupid. As I mentioned, I was also distracted by the trading simulation game. We do not do anything to try to influence the index and have never done anything to try to influence the index. Ex. BP-016 at 9:1-9:5.

[307] Tr. at 323:12-323:14 ("Q. And you wanted to believe that whatever you had said to Mr. Parker was mistaken? A. I mean, again, I believe it was mistaken.").

3. Opinion No. 549 and the ID Drew Groundless Inferences From the November 5, 2008 Unrecorded Calls.

After the recorded call on November 5, 2008, Comfort and Luskie spoke on unrecorded calls two times that day.[308] Opinion No. 549 and the ID recognized that neither Comfort nor Luskie remembers details of the calls beyond the fact that Comfort expressed that he was upset with the incorrect comparison to the third party.[309] Despite this, the opinion and ID unreasonably concluded that these two unrecorded calls evidenced the Texas Team's guilt and determined, without evidence, that the "purpose with these phone calls was to start a cover-up." [310]

Moreover, Opinion No. 549 and the ID improperly speculated about the meaning and purpose of the phone conversations despite the lack of any witness recollection. The ID based this speculation solely on OE's conclusory assertion that the calls were part of a "cover-up."[311] As BP argued on exceptions, OE's assertion about a "cover-up" is "a derivative inference from its flawed trading analysis."[312] And, as a result, Opinion No. 549 and the ID erred in basing their conclusions on these derivative inferences. An ALJ's derivative inferences are entitled to no deference.[313] This is not an inference based on evaluation of the credibility of a witness. It is an unsupported invention.

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[308] ID at P 106.

[309] *Id.*; Opinion No. 549 at P 272; Tr. at 1210:9-14.

[310] ID at P 106.

[311] *Id.*; *see also* Opinion No. 549 at P 274.

[312] BOE at 25.

[313] *See*, *e.g.*, *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742 (D.C. Cir. 1988) ("[A]n administrative agency is not bound by [an ALJ's] secondary inferences, or derivative inferences, i.e. facts to which no witness orally testified but which the [ALJ] inferred from facts orally testified by witnesses whom the examiner believed.") (internal citation omitted).

The evidence shows that assertions of a "cover-up" are groundless, and Opinion No. 549 and the ID erred in accepting these assertions as valid. BP personnel promptly and proactively notified the CFTC and the Commission quickly opened its own inquiry.[314] Opinion No. 549 and the ID erred in adopting any inferences from these two unrecorded phone calls.

Opinion No. 547's finding that BP trader Barnhart must have known of the scheme or turned a blind eye to the "scheme" because she "benefited" is contrary to record evidence adduced by OE itself from Barnhart.

OE established that Barnhart was not personally responsible for trading HPL transport;[315] that Barnhart was not primarily responsible for trading next-day fixed-price gas at HSC or Katy;[316] that Barnhart had no responsibility to calculate daily profits and losses;[317] that Barnhart had no responsibility in 2008 for formulating a view with respect to next-day fixed-price physical gas at HSC or Katy during 2008;[318] that Barnhart did not know in 2008 whether Comfort sold at HSC before Katy was open,[319] and would not

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[314] After the November 5 recorded call, Comfort discussed the tape with his direct supervisor, Kevin Bass ("Bass"). Bass told Comfort to furnish a copy of the tape to BP compliance for their review. On November 6, at 5:39 a.m., Comfort informed IST Compliance Analyst Steve Simmons ("Simmons") of the call and asked that Simmons review its contents. Simmons responded in less than two hours and notified Comfort that BP compliance would review it. BP compliance then reviewed the telephone call, escalated the review within the company, and prepared to thoroughly review the telephone call and the activity discussed therein. On the same day that the recorded call occurred, BP reported it to the Independent Monitor. The next day, November 6, 2008, BP provided the Independent Monitor with a recording. On or about November 17, 2008, the Independent Monitor furnished a copy of the recording to the CFTC, and the CFTC provided a copy to Staff that same day. *See* BP-001 at 19:13-19:18.

[315] Tr. 876:23-25.

[316] Tr. 877:1-4.

[317] Tr. 878:1-5.

[318] Tr. 878:12-15; Tr. 880:11-15.

[319] Tr. 880:22-25.

have known whether Comfort made a series of fixed-price trades at HSC at any given day in 2008 and calculate those trades made or lost money.[320]

D. Opinion No. 549 Improperly Disregarded Substantial Record Evidence that Comfort Did Not Possess a Motive to Engage in a Manipulative Scheme.

OE fashioned from whole cloth a theory that Comfort had a specific motive to manipulate based on his presumed fear that he was at imminent risk of losing his job.[321] OE attempted to prove this theory through the testimony of adverse BP witnesses. OE failed. The record evidence showed that Comfort (a) did not fear losing his position; (b) had more than adequate financial resources; and (c) had qualified for permanent health insurance the month before the alleged "scheme" took place.

The ID, in response, incorrectly found that OE did not have to prove "motive" in addition to intent. But the ID incorrectly found that OE had nonetheless proven motive because any trader who receives a bonus based at least in part on trading performance will have a specific motive to manipulate.[322] This finding, and Opinion No. 549's affirmance of this finding, were plain error.[323]

OE asserted that Comfort's motive to manipulate was based only on the fact that he had left his prior position and feared for the security of his job. On exceptions, BP revealed the fallacy of this claim, detailing the fact that Comfort did not need to retain his

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[320] Tr. 881:1-5. On the issue of an alleged benefit, BP's position lacked the leverage necessary to generate any material benefit. Tr. 2541:21 to Tr. 2543:2.

[321] *BP America Inc.*, Enforcement Staff Report and Recommendation, Docket No. IN13-15, at 15-16 (Aug. 5, 2013).

[322] ID at P 105 n.73.

[323] Opinion No. 549 at P 236.

job.[324] In fact, he had substantial savings and could have retired with full medical benefits before the Investigative Period.[325] However, Opinion No. 549 and the ID ignored this complete lack of motive. And, in fact, the ID created an entirely new purported motive – that Comfort wanted to keep his job to earn a bonus.[326] This finding is wholly groundless and Opinion No. 549 erred in affirming it.[327]

Instead, the evidence shows that Comfort did not possess a motive to engage in a manipulative scheme. The ID recognized that motive is relevant[328] but overlooked evidence establishing the lack of motive and instead concluded that motive existed.

Opinion No. 549 and the ID rested their conclusions on an industry-standard compensation scheme and rejected wholesale BP's arguments.[329] Bonuses for natural gas industry traders frequently reflect, in part, a trader's financial performance for the company. Under this logic, any trader at any company with a compensation package based, even in part, on financial performance possesses a per se motive to engage in manipulation. The ID's reasoning, which Opinion No. 549 erred in affirming, essentially prejudges scienter based solely on a company's compensation plan.

The record clearly establishes that Comfort lacked a motive to "tarnish an otherwise unblemished reputation in his field."[330] Comfort was highly respected in the

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[324] BOE at 26-27.

[325] *Id.* at 26.

[326] ID at P 107 n.76.

[327] Opinion No. 549 at P 236.

[328] ID at P 105 n.73.

[329] *Id.*; Opinion No. 549 at P 236.

[330] BOE at 26.

industry and testified about his substantial net worth following 2007.[331] In addition, he testified that his incentive for remaining employed at BP was to trigger retiree medical benefits, which vested before the purported scheme – in August 2008.[332] The ID erred in assuming, and the order in concurring, that Comfort must have had a motive to engage in manipulation because he continued to work. However, OE cited no evidence to support this blanket assumption that, as BP articulated on exceptions, "an employee who does not retire as soon as he is financially able must be motivated by a desire to risk ruining a respected reputation and become a lawbreaker."[333] The ID's rejection of BP's arguments, which Opinion No. 549 erred in affirming, lacks any and all reasoned basis. Further, the record shows that Comfort lacked a meaningful opportunity or incentive to manipulate. As Evans testified:

> Q. We've previously discussed, Mr. Evans, your testimony concerning the overlap of the short HSC and long Henry Hub positions.
>
> Is it your understanding that this overlap is what Mr. Bergin and the Enforcement Staff believe was the central manipulative motivation in this case?
>
> A. Yes; that's correct.
>
> Q. And what size position is that overlap in October and November, according to Mr. Bergin's testimony?
>
> A. It's approximately 450 contracts of short Houston Ship Channel versus Henry Hub swing.
>
> Q. With positions of these sizes in relation to the physical baseload positions, would one have a reasonable expectation of the manipulative profit by attempting to suppress HSC prices with next-day trading?

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331 Tr. at 833:4-833:13 and 1440:4-9.

332 Tr. at 1438:9-21.

333 BOE at 27.

> A. Given the size of the physical baseload positions, again going back to the concept of this cross-market leverage type of an allegation, that if you have a much higher multiple of contracts that stand to benefit by taking purposeful losses, by suppressing Houston Ship Channel, I can understand a rational potential motivation there for a trader who might want to lose on, you know, 500 contracts of its long physical position in order to make on 5,000 contracts of its ─ of the short financial position.
>
> Absent leverage in that ratio that indicates that a trader could logically use their physical baseload as a tool to take losses and suppress and expect to get a better profit on a very small offsetting position, more like balance 1-to-1, I can't logically think that a trader would have a reasonable profit motive here. The numbers just don't make sense to me.[334]

Opinion No. 549 further erred in finding that the supposed motive "establishes Comfort's intent" to manipulate the market.[335] First of all, equating motive with intent is legally incorrect.[336] Second, because the evidence does not support this contrived motive, there is no evidence of intent. Accordingly, Opinion No. 549 failed to establish a key element of OE's manipulation claim.

1. Opinion No. 549 Erred in Adopting the ID's Conclusion that Changes in BP's Trading Behavior During the Investigative Period Support a Finding of Market Manipulation.

As an initial matter Opinion No. 549 incorrectly stated that BP did not challenge the finding that BP shifted to net selling at HSC.[337] Whether BP became a net seller at HSC is irrelevant because, as BP noted in its Brief on Exceptions, net selling is not manipulative conduct and neither the ID nor Opinion No. 549 cited any precedent to the

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[334] Tr. at 2541:21-2543:2.

[335] Opinion No. 549 at P 236.

[336] "Intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." 1 Devitt & Blackmar, FED. JURY PRACTICE AND INSTRUCTIONS at 395 § 14.11 (3d Ed. 1977).

[337] Opinion No. 549 at P 70.

contrary. Evans testified that net selling at HSC is a consequence of being long gas at an upstream point and owning transportation capacity to move that gas to a downstream market area. Further Evans did demonstrate, through his intermarket analysis that HSC was overwhelmingly the better (higher-priced) market at the moments BP was selling its day-ahead positions.

Opinion No. 549 also stated that BP did not challenge the finding that BP had "shifted to buying at HSC later in the day."[338] This contention misses the point. Late purchases are completely inconsistent with OE's (price suppression) theory of manipulation and form no part of the alleged price artificiality claimed by Abrantes-Metz. In addition, purchases are not jurisdictional under Section 1(b) of the NGA. No claim of artificiality is based on this "factor," nor could one be. Nor is this what Abrantes-Metz claimed.[339]

2. Opinion No. 549 Erred in Finding that BP's Next-Day Physical Gas Trading Was Unprofitable as Compared to the Pre-Investigative Period.

Opinion No. 549 erroneously affirmed the ID's determination that BP engaged in uneconomic physical trading over the course of the Investigative Period. In fact, the evidence showed that BP did not have heavy consistent losses over that period. Rather, one anomalous trading day largely drove the aggregate average physical losses that BP suffered during the 58 percent of the Investigative Period days on which BP lost money. Opinion No. 549 and the ID also erred because each decision's consideration of BP's physical trading losses, a lynchpin of the alleged scheme, looked only to average losses

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[338] *Id.*

[339] OE-129 at 74:12 to 74:21 ("[t]he Texas team buys would have had a minimal effect on subsequent trades by other market participants.").

rather than day-to-day losses. BP raised both points in its post-hearing briefs and on exceptions, and the ID and Opinion No. 549 failed meaningfully to consider the argument.

Substantial record evidence demonstrated that BP's physical trading losses during the IP were insignificant on many days. As BP set forth in Table 1 in its Brief on Exceptions,[340] on 11 of the flow dates on which losses accrued under Bergin's flawed methodology, the daily loss was less than $1,500. In two cases, the loss was less than $100. These facts do not constitute substantial evidence regarding profitability that could support inferring a manipulative scheme due to a consistent pattern of heavy losses, even if Bergin's hindsight-based analysis were incorrectly adopted without modification.

E. Opinion No. 549's Consciousness of Guilt Theory has no Applicability to this Case.

Opinion No. 549 improperly applied a consciousness of guilt theory to Comfort's demeanor on the November 5 call in an unreasoned manner that is not supported by record evidence.[341] The Commission agreed with OE's position that courts have relied on the consciousness of guilt theory in several civil contexts. OE relied on two cases for this proposition.[342] But each case cited in Opinion No. 549 is inapposite. In each, there

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[340] BOE at 20, Table 1: Texas Team Alleged Gaines and Losses in the Investigative Period (Source: Ex. BP-055 at tab "Phys P&L by day").

[341] Opinion No. 549 at PP 268-76.

[342] *See* Opinion No. 549 at P 276 n.623 (citing *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998) and *Alberto-Culver co. v. Andrea Dumon, Inc.*, 466 F.2d 705,709-10 (7th Cir. 1972)). BP continues to contend that the consciousness of guilt theory is not appropriate to apply in the context of BP's case. *United States v. Marfo*, 572 Fed. Appx. 215 (4th Cir. 2014), *cert. denied*, 135 S.Ct. 468 (2014); *Maldonado v. Olander*, 108 Fed. Appx. 708, 712 (3d Cir. 2004), *cert. denied*, 544 U.S. 908 (2005); *United States v. Littlefield*, 840 F.2d 143, 148 (1st Cir. 1988), *cert. denied*, 488 U.S. 860 (1988).

was a finding that the evidence was sufficient to establish a finding of mendacity.[343] Here, there is no false testimony, no lying, nothing that could by a strained analogy to the consciousness of guilt theory justify inferring unlawful conduct. Denial of misconduct is not a false exculpatory statement.

Opinion No. 549, like the ID, improperly disregarded Comfort's explanations for his trading behavior in preference of the flawed and unrepresentative data analysis of OE's expert witnesses. In fact, BP produced significant evidence that was incorrectly ignored by both the ID and Opinion No. 549 showing the multiple legitimate factors that went into each trading decision, and the non-manipulative reasons explaining the Texas Team's trading.[344] Opinion No. 549 failed to provide a reasoned decision supported by substantial evidence that could justify ignoring all this evidence, particularly with respect to its relevance to the consciousness of guilt theory offered by OE.

The best Opinion No. 549 could muster was a generalized finding that it is "not credible that neither Comfort nor Luskie can recall the details of what would have been two critical telephone calls."[345] The opinion thereby improperly inferred based on the consciousness of guilt theory that the "unrecorded calls were part of an effort to conceal the manipulative scheme."[346] This conjecture and speculation is not supported by

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[343] *See Aka*, 156 F.3d at 1300 (stating that "[t]here is in sum enough evidence, we believe, to create a jury question as to whether WHC's explanation for not hiring Aka was false . . . ."); *Alberto-Culver Co.*, 466 F.2d at 709-10 ("We think plaintiff misconceives the legal effect of such false testimony. Certainly, it justifies a total discrediting of Malits' testimony").

[344] For example, BP produced evidence demonstrating that its baseload position, the impact of Hurricanes Ike and Gustav, and the financial and credit crises all affected its trading in the IP. Ex. BP-013; Ex. BP-020; Ex. BP-023; Ex. BP-024; Ex. BP-037; Ex. BP-056; Ex. BP-058; Ex. BP-064.

[345] Opinion No. 549 at P 274.

[346] *Id.*

substantial evidence and the Commission's failure to independently set forth the basis for its inclusion fails to constitute reasoned decisionmaking.

F. The Commission has Failed to Establish Jurisdiction in This Case.

The conduct that the Commission seeks to sanction in this case is comprised of BP's sales and transportation on Houston Pipeline, an intrastate pipeline subject to the jurisdiction of the Texas Railroad Commission. The Commission nevertheless found that it has NGA jurisdiction over BP's activities based on the conclusions that (1) BP's sales transactions contributed to the formation of the *Gas Daily* index for HSC, which index was used in the pricing of NGA-jurisdictional third party sales and NGA-jurisdictional cash out transactions by Northern Natural Gas Company ("Northern Natural"), an interstate pipeline, and (2) BP itself engaged in a limited number of sales that the Commission erroneously characterizes as NGA-jurisdictional sales.[347]

Opinion No. 549's jurisdictional analysis cannot stand. With respect to the first justification, federal courts have repeatedly rejected the Commission's attempts to expand its jurisdiction in such a manner beyond what is permitted under Section 1(b) the NGA. With respect to BP's transactions, a close, objective look at the evidence shows that OE did not meet its burden to prove that any of the identified transactions were in fact NGA-jurisdictional transactions. As a result, the Commission does not have jurisdiction over any of BP's conduct in this case and the case should be dismissed.

[347] Opinion No. 549 at PP 308-357.

1. Opinion No. 549 and the ID Erred in Finding that the Commission has Jurisdiction over BP's Conduct by Virtue of Third Party Sales and Pipeline Cash Out Transactions that were Priced in Reference to the HSC *Gas Daily* Index.

The Commission does not have jurisdiction over BP's intrastate and other non-jurisdictional activity on the basis that such sales contributed to the construction of the *Gas Daily* HSC index, which was used by others to price jurisdictional sales transactions.

Opinion No. 549 found that two types of third party transactions were priced off the HSC index—third party natural gas sales and cash out transactions.[348] Opinion No. 549 observed that OE proffered 46 examples of natural gas sales made by third parties utilizing the HSC index[349] and that OE also proffered examples of cash out transactions made by Northern Natural.[350] Cash out transactions are used by interstate pipelines to eliminate imbalances between receipts and deliveries.[351] Bergin asserted that Northern Natural's FERC Gas Tariff in effect during the Investigative Period priced cash-out imbalances off the "Average Gulf Coast Monthly Index Price," which incorporated among others the HSC *Gas Daily* index price.[352]

The alleged jurisdictional sales associated with index transactions represent approximately 0.95 percent of the volumes of third party HSC and Katy volumes used by

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348 Opinion No. 549 at PP 313-16, 321-22.

349 *Id.* at P 313.

350 *Id.* at PP 321-322.

351 *Id.* at P 23.

352 Tr. at 1581:9-1582:2; Ex. OE-161 at 93:8-93:19; Ex. OE-182 at 5.

Ronn to calculate "harm to the market" for September, 0.22 percent of the same volume for October, and 2.9 percent of the same volume for November 2008.[353]

The Northern cash out volumes are about 0.23 percent of the third party HSC and Katy volumes used by OE witness Ronn to calculate harm to the market in September, 0.03 percent of the same volume for October, and 0.08 percent of the same volume for November 2008.[354]

None of the transactions described above were transactions in which BP was a seller. Nor did the ID or Opinion No. 549 find that BP's sales that contributed to the HSC index in these two sets of examples were themselves NGA-jurisdictional. Instead, the ID found and Opinion No. 549 affirmed that because third parties utilized the HSC index for unrelated jurisdictional sales, the Commission has jurisdiction to sanction BP's otherwise non-jurisdictional activity. In affirming the ID on this point, Opinion No. 549 reasoned that:

> [T]he "in connection with" provision of section 4A of the NGA provides authority over manipulative conduct that directly affects wholesale rates. The Commission's "in connection with" authority is solely directed at protecting jurisdictional markets, but to do so effectively it must reach conduct that "directly affects" these jurisdictional markets—that is, there must be a nexus between the conduct and the matters within the Commission's regulatory jurisdiction—and in so doing the Commission is

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[353] *See* Ex. OE-161, Appendix B, nn. 1-45 (Protected) (identifying Exs. OE-172 and OE-169 as the source of the data regarding the index sales at issue); OE-172 (Protected) at 3 nn.1, 3 & 5 (identifying trades in OE-172, Appendix B, lines 9105, 10843, 11031, 11496, 11677, 11006, and 9653 as the relevant index sales and providing volume data for each sale); Ex. OE-169 (Protected), , lines 1-40 (providing volume data for each referenced sale); Ex. OE-155 at 15 Table 1 (setting forth total third party next-day physical gas transaction volumes used to calculate alleged harm to the market (column (6)). Note that the vast majority of the volumes for the month of November 2008 were related to transactions after November 5, 2008.

[354] Ex. OE-173 (Protected), at 29 (providing volume data for referenced imbalances); Ex. OE-155 at 15 Table 1 (setting forth total third party next-day physical gas transaction volumes used to calculate alleged harm to the market (column (6)).

> not asserting any general regulatory jurisdiction over intrastate or first sale natural gas. . . . As such, any impact on transactions involving non-jurisdictional natural gas is wholly incidental to the Commission's duty to protect jurisdictional markets, and that sort of incidental effect—even if it turns out to be significant in scope—is allowable, as the Supreme Court recently addressed in *EPSA*. Thus, BP is wrong: far from being limited to reaching only jurisdictional transactions, the Commission's anti-manipulation authority protects jurisdictional markets from manipulation, and this protective duty reaches manipulative transactions that directly affect jurisdictional markets—even if the manipulative instruments happen to involve non-jurisdictional natural gas. Accordingly, the NGA authorizes the Commission to employ its anti-manipulation authority to reach transactions involving non-jurisdictional natural gas so long as there is a nexus between those transactions and a matter within the Commission's jurisdiction.[355]

Opinion No. 549 is wrong. Section 1(b) of the NGA limits the Commission's jurisdiction in the natural gas markets. Nothing in the Energy Policy Act of 2005 ("EPAct 2005") expanded the Commission's jurisdiction to include sanctions of intrastate transactions and first sales. Moreover, as discussed below, the U.S. Courts of Appeals have rejected previous attempts by the Commission to expand its jurisdiction by invoking the "in connection with" language found in the NGA.

Section 1(b) of the NGA establishes boundaries around the Commission's jurisdiction:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . ., and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged

[355] Opinion No. 549 at P 313.

> in such importation or exportation, *but shall not apply to any other transportation or sale of natural gas*. . . .[356]

As the Supreme Court has summed up the Commission's jurisdiction under Section 1(b), Congress limited FERC's jurisdiction to (1) "the transportation of natural gas in interstate commerce;" (2) its sale in interstate commerce for resale; and (3) "natural-gas companies engaged in such transportation or sale," and expressly excluded "any other transportation or sale of natural gas …"[357] The Commission therefore does not have jurisdiction over intrastate transportation, intrastate sales, direct sales, or first sales.[358] Yet, Opinion No. 549 rejected this fundamental principle.

Section 4A, which was added to the NGA through the EPAct 2005 defines the type of market manipulation activity that is prohibited:

> It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with *the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission*, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.[359]

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[356] 15 U.S.C § 717(b) (2005) (emphasis added).

[357] *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947); *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258, 263 (5th Cir. 2011); *Westar Transmission Co.*, 43 FERC ¶ 61,050 at 61,140 (1988); *see also Shell Oil Co. v. FERC*, 566 F.2d 536, 539 (5th Cir. 1978), *aff'd*, 440 U.S. 192 (1979). The only modification to Section 1(b) in EPAct 2005 was to add "the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation" to the scope of FERC's jurisdiction. 15 U.S.C. § 717(b).

[358] *Panhandle E. Pipe Line Co.*, 332 U.S. at 519 (holding that the jurisdiction conferred on the Commission by Congress in the NGA "did not include direct consumer sales, whether for industrial or other uses"); *Tex. Pipeline Ass'n*, 661 F.3d at 262, 263 ("Congress . . . chose instead to leave regulation of certain entities, including intrastate transactions and pipelines, to the states."); *Nat'l Ass'n of Gas Consumers v. All Sellers of Natural Gas in the United States in Interstate Commerce*, 106 FERC ¶ 61,072 at P 7 (2004) (holding that the Commission lacks commodity jurisdiction over direct or retail sales); *Westar Transmission Co.*, 43 FERC ¶ 61,050 at 61,140 (1988); *Transwestern Pipeline Co.,* 19 FERC ¶ 61,191 at 61,371 (1982), *reh'g denied*, 20 FERC ¶ 61,327, *pet. dismissed*, 747 F.2d 781 (D.C. Cir. 1984).

[359] NGA § 4A, 15 U.S.C. § 717c-1 (2016) (emphasis added).

The plain language of Section 4A limits activity that the Commission may regulate to that in connection with sales and transportation "subject to the jurisdiction of the Commission," which is set forth in Section 1(b). Notably, while Section 4A refers to the jurisdiction of the Commission, nothing in Section 4A explicitly expands that jurisdiction. Therefore, Opinion No. 549 reached for alternative explanations to do so.

In a nutshell, relying on Section 4A's "in connection with" language, Opinion No. 549 asserted that the Commission has jurisdiction over otherwise non-jurisdictional sales and transportation when such transactions "directly affect" jurisdictional markets. However, the courts have rejected this interpretation of the "in connection with" language found in the NGA. Opinion No. 549 ignored or wrongly minimized this precedent.[360]

The D.C. Circuit squarely addressed and rejected identical reasoning in *Hunter v. FERC*.[361] In that case, the Commission fined Brian Hunter under Section 4A of the NGA $30 million for manipulating the settlement price of natural gas futures contracts. Hunter held significant positions in natural gas futures, and the Commission alleged that he sold large volumes during the settlement period to intentionally decrease the settlement price. At the same time, Hunter held short positions in natural gas that benefited from such price decreases.[362]

Natural gas futures contracts, like all commodity futures contracts, are regulated exclusively by the Commodity Futures Trading Commission and are outside the jurisdiction of the Commission. Despite the fact that the Commission does not have jurisdiction over natural gas futures, "FERC claimed that Hunter's manipulation of the

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[360] Opinion No. 549 at P 313.

[361] 711 F.3d 155 (D.C. Cir. 2013).

[362] *Id*. at 156.

settlement price affected the price of natural gas in FERC-regulated markets" and on that basis asserted jurisdiction over Hunter's activity.[363]

The *Hunter* court rejected the Commission's reasoning. The court first noted that the CEA vested jurisdiction of the futures markets with the CFTC. The court then asked two questions. First, did the CEA cover the activity in question? Second, if so, "did Congress clearly and manifestly intend to impliedly repeal the relevant section of the CEA when it enacted the Energy Policy Act 2005?"[364] The court found that Hunter's activity was covered by the CEA and therefore was CFTC-jurisdictional.[365] In analyzing whether Section 4A impliedly repealed the relevant section of the CEA, the court asserted: "On this front, FERC carries a heavy burden. As the Supreme Court has frequently observed, 'repeals by implication are not favored.' And as we have explained, repeals by implication 'will not be found unless an intent to repeal . . . is *clear and manifest*.'"[366] The court ultimately concluded that the Commission could not demonstrate that Section 4A encroaches on the CFTC's exclusive jurisdiction.

The analysis applied by the *Hunter* court is equally applicable here. As shown above, in Opinion No. 549 the Commission argued that it has jurisdiction on otherwise non-jurisdictional activity when it directly affects jurisdictional markets.[367] Section 1(b) of the NGA and the long-standing precedent interpreting that section exclude from the Commission's jurisdiction intrastate sales and transportation and reserve that jurisdiction for the States. Thus, the first prong of the two-prong test in *Hunter* is met. The next

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363 *Id*.

364 *Id*. at 158.

365 *Id*. at 158-59.

366 *Id*. at 159 (emphasis in the original; internal citations omitted).

367 Opinion No. 549 at P 313.

question, therefore, is whether the Commission can show that Congress expressed a clear and manifest intent to repeal Section 1(b). The Commission has not done so in Opinion No. 549, and the Commission cannot do so. There is nothing in Section 4A that clearly and manifestly modifies nearly 80 years of precedent regarding the Commission's NGA jurisdiction.

Opinion No. 549 attempted to narrow the holding in *Hunter* to situations in which two agencies assert conflicting jurisdiction.[368] However, the case applies in any instance where FERC's interpretation of a statutory provision effectively repeals or modifies a conflicting statutory provision (in this case, Section 4A repealing or modifying section 1(b)). *Hunter* is not limited to a dispute between two federal agencies because FERC cannot expand its jurisdiction of its own volition.

In response, Opinion No. 549 asserted that the Supreme Court has rejected BP's argument in *FERC v. Electric Power Supply Association* ("*EPSA*").[369] Opinion No. 549 incorrectly read *EPSA* as supporting the Commission's jurisdiction in this case. In *EPSA*, the Supreme Court permitted FERC to regulate under the Federal Power Act ("FPA") wholesales rates for demand response programs even though there was an incidental effect on retail rates, over which the States have exclusive jurisdiction.[370] In the demand response program under review, the regional wholesale market operators paid electricity consumers a wholesale rate for decreasing consumption during high demand periods in order to keep the wholesale market in balance at lower rates and to increase the reliability

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368 *Id*. at P 307.

369 136 S. Ct. 760 (2016). *See* Opinion No. 549 at PP 299-301, 304, 307.

370 *EPSA*, 136 S. Ct. at 763-64.

of the electric grid.[371] Petitioners challenged the program, arguing that this effectively regulated the retail market, as opposed to wholesale rates.

The Court disagreed. It determined that the Commission had the authority under the FPA to ensure that rules and practices "affecting" wholesale rates are just and reasonable.[372] However, the Court was troubled that a literal interpretation of "affecting" could extend the Commission's jurisdiction far beyond what Congress intended, stating "[a]s we have explained in addressing similar terms like 'relating to' or 'in connection with,' a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth."[373] To protect against unwarranted expansion of jurisdiction, the Court expressly limited the Commission's FPA jurisdiction to rules and activity that "directly" affect a wholesale rate.[374] Opinion No. 549 characterized the holding in *EPSA* as an expansive reading of FERC's jurisdiction, but it ignored the Supreme Court's "non-hyperliteral reading" language that narrowed jurisdiction.[375]

The Court then applied a two-part test to determine if the Commission exceeded its jurisdiction under the plain language of the statute: (1) Does the practice at issue in the rule directly affect the wholesale rate, and (2) In addressing these practices, has the

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371 *Id.* at 769-770.

372 *Id*. at 774.

373 *Id*.

374 *Id*.

375 *Id.*

Commission regulated retail activity?[376] In the current case, Opinion No. 549 misstated the *EPSA* test[377] and wholly failed to address the second prong of the test.

Opinion No. 549 concluded that the Commission has jurisdiction over otherwise non-jurisdictional activity because such activity, if manipulative, directly affects jurisdictional markets. But the *EPSA* Court was addressing whether the Commission's rules governing wholesale demand response programs directly affected wholesale rates.[378] Here, the question is different: can the Commission regulate BP's non-jurisdictional, intrastate activity that incidentally or indirectly affects wholesale rates.

As to whether FERC had impermissibly regulated retail (i.e., non-jurisdictional) rates, the Court stated:

> The above conclusion does not end our inquiry into the Commission's statutory authority; to uphold the Rule, we also must determine that it does not regulate retail electricity sales. That is because, as earlier described, §824(b) "limit[s] FERC's sale jurisdiction to that at wholesale," reserving regulatory authority over retail sales (as well as intrastate wholesale sales) to the States. . . . *FERC cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates*.[379]

The *EPSA* Court determined that, by regulating demand response, FERC's rule directly affected wholesale rates, and FERC did not exceed its jurisdiction. However, the enforcement action against BP is distinctly different. FERC has not implemented a rule in the interstate or wholesale markets that incidentally affects the intrastate or retail

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[376] *Id*. at 773. The court also criticized petitioner's argument on the grounds that it would result in no one being able to regulate demand response. *Id.* at 780-81.

[377] In paragraph 301, Opinion No. 549 fabricates a test that was not stated in *EPSA* and ignores the explicit test the court applied.

[378] *EPSA* at 774.

[379] *Id.* at 775 (emphasis in original in part and added in part; internal citations omitted).

markets. Rather, it is directly regulating BP's intrastate or otherwise non-jurisdictional sales because they contributed to an index. This is exactly the type of expansive Commission action the Court warned against in *EPSA* that crosses the jurisdictional line.

The Fifth Circuit has also rejected attempts by the Commission to expand its NGA jurisdiction under EPAct 2005. In *Texas Pipeline Association v. FERC*,[380] the court, applying the *Chevron* standard of review, rejected the same jurisdictional arguments that Opinion No. 549 essentially made in this case;[381] *i.e.*, that Congress, through section 4A, intended to create an anti-manipulation authority not limited by Section 1(b). The *Texas Pipeline* court rejected FERC's argument that Congress, through Section 23 of the NGA, intended to create a new "transparency authority" separate and distinct from the authority provided in Section 1(b).[382] The court observed that "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[383] The court explained that Section 23 does not "silently expand FERC's jurisdiction beyond the limits of § 1(b)."[384]

> That provision unambiguously denies FERC the power to regulate entities specifically excluded from Chapter 15B, including wholly-intrastate pipelines, given that they either are involved solely in the "local distribution of natural gas" or are otherwise involved in "other transportation" of natural gas not in interstate commerce. The entirety of Chapter 15B is inapplicable to intrastate pipelines, so

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380 *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011).

381 *Id*. at 260-64 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

382 *Id*. at 262.

383 *Id*. at 261 (citations omitted).

384 *Id*. at 262.

> neither § 23 nor the phrase "any market participant" can apply to those pipelines.[385]

The court in *Texas Pipeline* also rejected another Commission argument relevant in Opinion No. 549; *i.e.*, that the Congressional choice in section 23 to use the phrase "any market participant" over the statutorily-defined term "natural gas company" evinced Congress's intent for "any market participant" to be broadly construed.[386] Rejecting this argument, the court decided that "even if 'any market participant' has a greater scope than does 'natural gas company,' that does not free the term from the limitations imposed by § 1(b), nor would applying § 1(b) render the two terms synonymous."[387] The court concluded: "Where Congress *has* decided to expand FERC's jurisdiction, it has done so explicitly and unambiguously, as it did with the inclusion, within FERC's purview, [of] the foreign importation and exportation of natural gas in the Energy Policy Act of 2005—the very law that created § 23—by modifying § 1(b)."[388] In this case, Opinion No. 549 similarly attempted to expand the scope of the Commission's Section 4A jurisdiction by concluding that, had Congress intended to limit its section 4A jurisdiction to persons engaged in jurisdictional transportation and sales, Congress would have specified that the prohibition applied to "any natural gas company" rather than "any entity."[389] This argument fails under *Texas Pipeline* because, like in that case, Section 4A is still subject to the limitations imposed by Section 1(b).[390]

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385 *Id*.

386 *Id*. at 263.

387 *Id.*

388 *Id*. at 263-64.

389 Opinion No. 549 at P 294.

390 *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011).

Opinion No. 549 is also inconsistent with the D.C. Circuit's decision in *Conoco, Inc. v. FERC*.[391] *Conoco*, as applied to this case, stands for the proposition that Section 1(b) "forecloses … that the phrase 'in connection with' in § 4 permits it to regulate facilities that it has expressly found are not within its § 1(b) jurisdiction."[392] The court further concluded that: "[w]here an activity or entity falls within NGA § 1(b)'s exemption for gathering, the provisions of NGA §§ 4, 5 and 7, including the 'in connection with' language of §§ 4 and 5, neither expand the Commission's jurisdiction nor override § 1(b)'s gathering exemption."[393] Opinion No. 549 failed to address the court's holding that the Commission is constrained by Section 1(b).[394] Under the court's reasoning, Section 1(b) precludes the Commission from asserting jurisdiction over BP's intrastate transactions under Section 4A because the latter section cannot expand or override the former.[395]

As the Supreme Court recently held in *ONEOK, Inc. v. Learjet, Inc*., "the Natural Gas Act 'was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.'"[396] In *ONEOK*, the Supreme Court analyzed

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391 90 F.3d 536 (D.C. Cir. 1996).

392 *Id.* at 552.

393 *Id*.

394 Opinion No. 549 at PP 305-06.

395 *Conoco*, 90 F.3d at 553. Moreover, Opinion No. 549 failed to include the fact that the court's discussion "as an abstract matter" concluded with the following: "we are not in a position to evaluate this question other than as an abstract matter because the Commission has yet to assert its jurisdiction over a gathering affiliate." Opinion No. 549 at P 305 (quoting *Conoco*, 90 F.3d at 549) (emphasis added).

396 *ONEOK, Inc., v. Learjet, Inc.,* 135 S.Ct. 1591, 1599 (2015) (citing *FPC v. Panhandle E. Pipe Line Co*., 332 U.S. 507, 517-18 (1947) and *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n on Kan.*, 489 U.S. 493, 511 (1989)). *ONEOK*, *Inc., v. Learjet, Inc.,* relates to a pre-EPAct 2005 period. However, the only modification to Section 1(b) in EPAct 2005 was to add "the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation" to the scope of FERC's jurisdiction. EPAct 2005 did not otherwise change Section 1(b). *Tex. Pipeline Ass'n*, 661 F.3d at 263 (holding that unless otherwise expressly provided by Congress, the jurisdictional limitation in Section 1(b)

whether the state lawsuit targeted a pre-empted field and concluded that the lawsuit at issue was directed at practices affecting retail rates—which are "firmly on the States' side of that dividing line."[397] The EPAct 2005 did not seek to redefine that balance of power between the Commission and the States. The Commission acknowledged this in Order No. 670, stating that "[h]ad Congress intended to expand the Commission's jurisdiction so significantly as to give it anti-manipulation authority over such transactions as first sales of imported natural gas, intrastate sales of electric energy, retail sales of electric energy or energy sales by governmental entities, we believe it would have done so explicitly."[398]

In summary, the "in connection with" language in Section 4A of the NGA must be read in conjunction with the overall limiting language of Section 1(b). Opinion No. 549's claims of jurisdiction by way of third party sales and cash out transactions must be rejected.

2. The 52 Sales Attributable to BP Provide No Basis for Supporting a Finding of Jurisdiction or Market Manipulation.

In addition to finding that BP's non-jurisdictional sales contributed to the HSC *Gas Daily* index, which was used by others for jurisdictional sales, the ID and Opinion No. 549 also found that, based on Bergin's testimony,[399] BP made 52 "jurisdictional fixed price sales for resale," which also established jurisdiction.[400] However, the 52 sales in

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applies to the NGA as a whole, even as amended by EPAct 2005 and that "other parts of the NGA, as well as its history, confirm our conclusion that Congress did not intend to regulate 'the entire natural-gas field to the limit of constitutional power' but chose instead to leave regulation of certain entities, including intrastate transactions and pipelines, to the states").

397 *ONEOK*, 135 S.Ct. at 1600 (citations omitted).

398 Order No. 670 at P 20.

399 Ex. OE-001 at 139-156; Ex. OE-161 at 92, 94-90, 110-174 (Protected).

400 Opinion No. 549 at PP 323-357.

Bergin's testimony provide no basis for finding jurisdiction or market manipulation. In none of the 52 examples did OE prove that any sale or transportation transaction at or upstream of BP's sale of natural gas at HSC was NGA-jurisdictional. In none of the 52 examples did OE prove or even allege that any sale or transportation transaction downstream of BP's sale of natural gas at HSC was NGA-jurisdictional. In none of the 52 examples, therefore, has OE established jurisdiction in this case.

Moreover, BP has shown that the transactions either (i) did not occur on many of the days during the period, or (ii) were not shown to be manipulative under OE's theory of manipulation.

a. OE Has Not Shown That the Commission Has NGA Jurisdiction Over Any of Bergin's 52 Examples.

i. Gas that is Transported on an Interstate Pipeline Under the NGPA is not NGA-Jurisdictional Gas.

To analyze the jurisdictional significance of the 52 examples proffered by Bergin, it is crucial to understand that not all gas transported on an interstate pipeline is NGA-jurisdictional. The ID stated that "Bergin testified there are 52 examples he identified during the Investigative Period of BP's sales traced upstream to an interstate pipeline . . . Thus, these examples all include interstate natural gas."[401] It also concluded that "[a]s noted in Paragraph 158, *supra*, jurisdiction over natural gas, from a previous upstream transaction, makes these transactions jurisdictional."[402] The ID and Opinion No. 549 erred in accepting OE's position that it need only establish that the gas at issue was "interstate" in order for it to be subject to NGA jurisdiction.

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[401] ID at P 158.

[402] *Id.* at P 168.

The Commission may establish NGA jurisdiction over gas by virtue of either jurisdictional sales or transportation.[403] With respect to sales, the Commission's jurisdiction excludes first sales, direct sales, and intrastate sales. With respect to transportation, natural gas that is transported on interstate pipelines pursuant to Natural Gas Policy Act ("NGPA") Section 311(a)(1)[404] may be "interstate" in nature. However, "interstate" NGPA Section 311(a)(1) gas is not the same thing as "interstate" NGA gas. NGPA Section 311(a)(1) and Section 284.102[405] of the Commission's rules allow interstate pipelines to transport gas "on behalf of"[406] intrastate pipelines and LDCs.[407] NGPA Section 601(a)(2)(A) ***excludes*** such transportation from the Commission's NGA jurisdiction. Section 601(a)(2)(A) states:

> For purposes of section 1(b) of the Natural Gas Act [15 U.S.C. 717(b)] the provisions of such Act [15 U.S.C. 717 et seq.] and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is . . . authorized by the Commission under section 3371(a) [NGPA § 311(a)] of this title.[408]

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[403] 15 U.S.C § 717(b) (2005); *see also Westar Transmission Co.,* 43 FERC ¶ 61,050, 61,140-41 (1988); Opinion No. 549 at PP 349-350.

[404] 15 U.S.C. § 3371(a)(1).

[405] 18 C.F.R. § 284.102 (2016).

[406] Transportation of natural gas is not "on behalf of" an intrastate pipeline or local distribution company unless: (1) The intrastate pipeline or local distribution company has physical custody of and transports the natural gas at some point; or (2) The intrastate pipeline or local distribution company holds title to the natural gas at some point, which may occur prior to, during, or after the time that the gas is being transported by the interstate pipeline, for a purpose related to its status and functions as an intrastate pipeline or its status and functions as a local distribution company; or (3) The gas is delivered at some point to a customer that either is located in a local distribution company's service area or is physically able to receive direct deliveries of gas from an intrastate pipeline, and that local distribution company or intrastate pipeline certifies that it is on its behalf that the interstate pipeline is providing transportation service. 18 C.F.R. § 284.102(d) (2016).

[407] Conversely, NGPA Section 311(a)(2) allows intrastate pipelines to transport gas "on behalf of" interstate pipelines or local distribution companies served by interstate pipelines. *See* 18 C.F.R. § 284.122 (2016).

[408] 15 U.S.C. § 3431(a)(2)(A).

Therefore, as argued in BP's Brief on Exceptions,[409] it is not enough to show that subject gas was transported on an interstate pipeline; to prove transportation jurisdiction in this case, *OE must show that the gas was transported on an interstate pipeline other than pursuant to the NGPA*. OE failed to do this in every one of the 52 examples, and because the sales upstream of BP's sales were also non-jurisdictional, the ID and Opinion No. 549 erred in concluding the Commission has jurisdiction in this case on the basis of upstream transportation jurisdiction.

The ID declined to acknowledge the Commission's recognition of this principle in *Westar Transmission Company*,[410] because, "the natural gas industry and the Commission's overview of natural gas markets evolved. Since the issuance of *Westar*, the Commission embraced its duty and obligation to protect the sanctity of natural gas markets from abuses and manipulation."[411] The notion that the evolution of the industry and the Commission's issuance of its market manipulation rule could somehow overturn a federal statutory limitation on its jurisdiction (NGPA Section 601(a)(2)(A)) is legally unsupportable.

For its legally incorrect conclusion that "natural gas sold at an interstate meter becomes interstate natural gas" and thus subject to NGA jurisdiction,[412] the ID relied on Bergin's "understanding of that,"[413] and *Energy Transfer Partners, L.P.*[414] However, by his own admission, Bergin did not hold himself out as an expert on FERC's jurisdiction

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409 BOE at 73–74.

410 43 FERC ¶ 61,050 (1988).

411 ID at P 169 n.120 (citing Order No. 670).

412 *Id.* at P 147 n.113.

413 Tr. 1709:14-18.

414 120 FERC ¶ 61,086 at P 173 (2007).

over sales and transportation of natural gas.[415] Rather, the "elements" of "jurisdiction were *explained to [Bergin] by staff*."[416] Bergin also testified that he is not providing any conclusions or determinations as to whether any of BP's transactions are jurisdictional.[417] Instead, through his testimony, Bergin interpreted the data gathered from third-parties, tracked or pathed the gas, and provided answers to OE's questions related to jurisdiction.[418] Further, the *Energy Transfer Partners, L.P.* decision relied on *California v. Lo-Vaca Gathering Co*.[419] However, the commingling doctrine enunciated in that case no longer applies because of Congress's subsequent enactment of NGPA Section 601.

Finally, for none of the 52 examples did the ID or Opinion No. 549 allege that any transaction downstream of BP's sales were sales for resale in interstate commerce.

ii. Transactions.

Relying on *Westar*, BP explained that 18 of the 52 examples (including Example No. 1, the first of the only two examples in Bergin's direct testimony,[420] those in which was identified as a counterparty) were not jurisdictional because before BP's purchase (1) the gas was sold as non-jurisdictional and (2) the gas was transported on non-jurisdictional transportation contracts.[421]

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[415] Tr. 1566:4-7; 22-23.

[416] Ex. OE-161 at 103:16-17 (emphasis added) and 104:7.

[417] Tr. at 1567:15-1567:22.

[418] Tr. at 1566:24-1567:22; Ex. BP-054 at 3-4 (stating that in his pre-filed testimony, Mr. Bergin "state[d] the basis for his conclusion that BP shipped interstate gas to Houston Ship Channel (HSC) that the Texas team sold for resale at fixed-price during the Investigative Period").

[419] 379 U.S. 366 (1965).

[420] Example Nos. 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 38, 41, 42, 43, 45, and 47.

[421] BOE at 76–77.

An analysis of Example No. 1 is relevant to each of the 18 examples. Bergin's first example is a [422] to BP.

[423] This, by definition, is a , which is a non-jurisdictional sale.[424] Prior to its to BP, shipped gas over an interstate pipeline, and then on under NGPA Section 311(a)(2)[425] contracts to Katy Oasis.[426] The Texas team then purchased the gas at Katy Oasis.[427] Because the gas was resold within Texas and was shipped on Section 311 contracts, it remained non-jurisdictional.[428]

[429] [430] Because this gas was never shipped on an interstate pipeline under the NGA (as opposed to under the NGPA) it remained non-jurisdictional, both in terms of transportation and sale, through BP's sale at

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[422] *See* Ex. OE-167 at P 9; see also Ex. OE-161 at 163, n.291 (relying on representations regarding natural gas sold to BP).

[423] Ex. OE-001 at 144:13-145:7.

[424] *Westar Transmission Co*., 43 FERC ¶ 61,050 at 61,140 (1988) (holding that sections 601(a)(1)(D) and 601(a)(2)(B) remove the downstream "sales [of first sale gas] to intrastate customers, those customers' sales for resale, and the transportation involved in those transactions"); s*ee City of Farmington, N.M. v. FERC*, 820 F.2d 1308 (D.C. Cir. 1987); *Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 at P 22 (2004); Ex. OE-167 at P 9; *see also* Ex. OE-161 at 163, n.291 (relying on representations regarding natural gas sold to BP).

[425] 15 U.S.C. § 3371(a)(2). NGPA Section 311(a)(2) allows intrastate pipelines to transport gas "on behalf of" interstate pipelines or local distribution companies served by interstate pipelines. *See also* 18 C.F.R. § 284.122 (2016).

[426] Ex. OE-001 at 141:6-142:8 (Protected).

[427] Ex. OE-001 at 141:13-141:14 (Protected).

[428] Ex. BP-030 at 13:1-13:13; *Westar Transmission Co.*, 43 FERC ¶ 61,050, 61,140.

[429] Ex. OE-032.

[430] Ex. OE-001 at 141:15-141:19, 145:19-146:12 (Protected).

HSC.[431] Section 4A only applies to sales and transportation "subject to the jurisdiction of the Commission;" *Westar* shows that Bergin's Example No. 1 is not subject to the jurisdiction of the Commission.[432] This result applies equally to the other transactions.

As an initial matter, there is no finding in Opinion No. 549 that the sales of natural gas upstream of BP's sales off Houston Pipeline were not first sales by third parties.[433]

The ID and Opinion No. 549 did not allege that any sales downstream of BP's sales were sales for resale in interstate commerce. Opinion No. 549 nevertheless found that the 18 examples were jurisdictional because, contrary to BP's assertions, prior to BP's purchase of such gas, the gas had been shipped on under the NGA (citing Ex. OE-167 at 173-75 (Protected); Ex. OE-001 at 141, 142, 145 (Protected); Ex. OE-161 at 110-121, 129-133 (Protected)). Opinion No. 549 found jurisdiction on the grounds that transportation over was NGA-jurisdictional. Opinion No. 549 held that:

> In short, for the precedent in *Westar* to apply, all upstream transactions, including both sales and transportation, must be exempt from NGA jurisdiction. Here, because the upstream transportation on the interstate pipelines was subject to NGA jurisdiction, BP's subsequent sales for resale in interstate commerce were subject to NGA jurisdiction, despite the fact the third parties' upstream sales to BP in the 18 instances cited by BP were exempt from NGA jurisdiction.[434]

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431 *Westar*, 43 FERC at 61,140.

432 15 U.S.C. § 717c-1 (2016); *see also* 15 U.S.C. § 3431(a).

433 *See* Opinion No. 549 at P 350.

434 *Id.*

However, the evidence indicates Opinion No. 549 is wrong. Bergin's testimony at Ex. OE-161 (pp. 110-174) does not indicate that any upstream interstate pipeline transportation contracts in question are jurisdictional contracts. For example, Opinion No. 549 cites to Ex. OE-167 at pp. 173-75,[435] which is a copy of Contract No. to support the finding that transportation on under that contract was jurisdictional. Contract No. states in its title that service is provided under Part 284 Subpart G. However, as BP pointed out in its Brief on Exceptions,[436] does not have separate forms of service agreements for transportation provided under the NGA and that provided under Section 311(a)(1) of the NGPA. What is more, **indicated in its sworn response to data request [437] that Contract No. was in fact an NGPA § 311 contract, whatever its title**.[438] Both the ID and Opinion No. 549 found NGA jurisdiction on the grounds that Contract No. provided for NGA transportation.[439] This assumption regarding Contract No. is wrong. Therefore, rather than establishing NGA jurisdiction in this case, Contract No. brings transactions squarely under *Westar*. Opinion No. 549's additional

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435 Opinion No. 549 at P 349 n.797.

436 BOE at 79 n.369.

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Ex. OE-167 at 7-8.

438 *See* Ex. OE-167 at 1-2, 2 n.2, at ; Ex. OE-069 at cells ; Ex. OE-053 at 8.

439 ID at PP 168-69; Opinion No. 549 at PP 349-50.

citations to Bergin's testimony at OE-001, on pages 141-42 and 145,[440] were also unavailing because Bergin did not discuss Contract No. or describe with any particularity transportation on . Neither the ID nor Opinion No. 549 identified or attempted to characterize any other upstream interstate pipeline transportation in any of the 52 examples as NGA transportation.[441] Given this incomplete evidence, OE did not prove and the Commission cannot find that the transportation on or any other interstate pipeline was jurisdictional. To do so would be contrary to the substantial evidence requirements of the APA.[442] Both the sales and transportation transactions upstream of BP's sales are non-jurisdictional. Under the NGPA and *Westar*, BP's subsequent, downstream sales are exempt from NGA jurisdiction.

Finally, the ID also distinguished the present case from *Westar*, on the ground that BP, unlike Westar, is not a Hinshaw pipeline.[443] That distinction makes no difference. In *Westar*, the Commission concluded that NGPA Sections 601(a)(1)(D) (NGPA first sales) and 601(a)(2)(B) (NGPA transportation) exempted all downstream transactions within the state from NGA jurisdiction because those sections exempt "any person" from becoming a "natural gas company" solely by reason of the upstream exempt transportation and sales.[444] Therefore, it is immaterial whether BP is a Hinshaw pipeline; the NGPA makes no such distinction.

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[440] Opinion No. 549 at P 349 n.797.

[441] *See* ID at P 168; Opinion No. 549 at P 349.

[442] *See supra* section IV.B.

[443] ID at P 169.

[444] *Westar*, 43 FERC at 61,142; *see also* Opinion No. 549 at P 348.

iii. Intracompany Transfers.

OE failed to prove that another 18 of the 52 sales were jurisdictional, those that pertained to non-jurisdictional intracompany transfers between teams within BP. In each of these examples, "BP's West team delivered physical natural gas from the interstate pipeline to Katy Oasis on a 311 contract with Oasis Pipeline."[445]

Opinion No. 549 concluded that BP's intracompany transfer argument is irrelevant because the gas had been shipped on an interstate pipeline under an NGA transportation contract (citing Ex. OE-161 at 111-122, 126-129, 132-133). However, while it may be true that Bergin's testimony shows that, upstream of BP's sales, the gas had been transported on , an interstate pipeline, as shown above the simple fact that transportation occurred on an interstate pipeline is not enough to bring the transportation within the Commission's NGA jurisdiction. Gas can be transported on an interstate pipeline under Section 311(a)(1) of the NGPA without it becoming jurisdictional. Nothing in Bergin's testimony proves that the transportation on was pursuant to the NGA.

Nothing in Bergin's testimony shows that the sales upstream of the West Team's transfer to the Texas Team were jurisdictional sales.

The sales from the West Team to the Texas Team, while not first sales, are nevertheless non-jurisdictional because they are intracompany transfers. An analysis of the second of two examples (Example No. 2) in Bergin's direct testimony illustrates this

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[445] Ex. OE-161 at 111-122, 126-129, 132-133 (Example Nos. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 33, 34, 36, 39, 44, 46).

point. Bergin's second example consists of gas that, after coming off of , BP's West Team shipped on Oasis Pipeline, an intrastate pipeline, under a NGPA contract to Katy Oasis. At Katy Oasis, the Texas Team purchased the gas from BP's West team. This transfer is not regulated by the Commission.[446] The Texas Team shipped the gas to the HSC Pool on the HPL intrastate contract, where it sold the gas.[447] As above, the gas retained its non-jurisdictional status through BP's sale at HSC.

In sum, OE has not provided evidence of jurisdictional transportation or sales upstream of the intracompany transfer, and the intracompany transfer is non-jurisdictional. As with the transactions, OE did not allege that sales downstream of BP's sales are in interstate commerce. Therefore, none of these 18 examples is jurisdictional under the NGA.

iv. The Remaining 16 Examples Suffer From the Same Flaw as the Other 36 and Have Not Been Shown to be Jurisdictional.

OE has not shown that the interstate pipeline transportation on the remaining 16 examples in Bergin's testimony was jurisdictional transportation. Instead, Bergin's analysis began in each case after the gas had been received from the interstate pipeline. As discussed above, merely showing that gas flowed on an interstate pipeline is not enough; to show jurisdiction based on upstream transportation the gas must be shown to

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[446] *Utah Power & Light Co*., 45 FERC ¶ 61,095, 61,296 (1988), *order on reh'g*, 47 FERC ¶ 61,209 (1989), *order on reh'g*, 48 FERC ¶ 61,035 (1989), *aff'd in part and remanded in part sub nom., Envtl. Action, Inc, v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991) ("[I]ntra-company transactions by and between the two divisions would no longer be 'sales for resale' and therefore will not be subject to a rate schedule or tariff on file with this Commission.") (interpreting analogous provision of the Federal Power Act); Ex. OE-001 at 152:17 – 152:19.

[447] Ex. OE-001 at 151:3 -155:3.

have been transported under the NGA for the Commission's Section 4A jurisdiction to attach.

The remaining 16 examples look at sales to BP by and Eleven examples pertain to sales made to BP by [448] and five by .[449]

For the transactions, Bergin's testimony described some of them as follows: " delivered physical natural gas from the interstate pipeline to Katy Oasis on 311 contracts. At Katy Oasis BP bought the interstate gas from and then shipped it to HSC pool."[450] In the other examples, is also listed as an interstate pipeline.[451] However, nothing in Bergin's testimony discussed the type of transportation (i.e., whether NGA or NGPA) that had *on* *or* . Nothing in Exs. OE-181, OE-184, and OE-185, to which Bergin cited, gives any such information. OE has failed to prove jurisdiction by transportation in these eleven examples.

Similarly, Bergin described the transactions as follows: "Physical natural gas was shipped from the interstate pipeline to Katy Oasis on 311 contracts."[452] Nothing in this statement provides any assertion or information regarding the type of transportation (i.e., NGA or NGPA) had on Nothing in Exs. OE-66, OE-67, OE-73,

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[448] Example Nos. 25, 26, 27, 28, 29, 30, 31, 32, 35, 37, 40.

[449] Example Nos. 48, 49, 50, 51, 52.

[450] Ex. OE-161 at 122-125 (internal citations omitted).

[451] *Id.* at 126-128, 130 (internal citations omitted).

[452] *Id.* at 134-136.

OE-179, and OE-190, to which Bergin cites, gives any such information. OE has failed to prove jurisdiction by transportation in these five examples as well.

Finally, nothing in Bergin's testimony shows jurisdictional sales at or upstream of BP's sales. Nothing in Bergin's testimony shows jurisdictional transactions down-stream of BP's sales. Opinion No. 549 therefore failed to established jurisdiction using these 16 examples.

b. OE Did Not Show That BP's Sales Were For Resale in Interstate Commerce.

In addition to failing to show that the upstream transportation of the gas BP sold was jurisdictionally interstate, Bergin also did not adequately link BP's sales at HSC to the upstream transactions in the 52 examples and therefore did not show that BP's sales at HSC were for resale in interstate commerce.

To show that BP's sales at HSC were linked to the 52 examples, Bergin attempted to trace gas through the HSC Pool. As Bergin conceded, tracing individual molecules of gas is impossible.[453] Instead, Bergin attempted to trace the path of gas sold by the Texas Team through the HSC Pool by using upstream and downstream contracts that he gathered from third-party data and documents and BP's internal documents. Bergin relied heavily on BP's scheduling spreadsheets to come up with the contract paths. However, as Clynes testified, the spreadsheets were maintained for balancing purposes only, i.e., the schedulers needed to ensure that the same amount went in and came out of the HSC Pool.[454]

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[453] Ex. OE-161 at 89:20 – 89:21, 95:16 – 95:19.

[454] Tr. at 2340:5 – 2341:6

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Although Bergin identified the contracts associated with the gas, his examples show nothing more than that BP delivered gas to the HSC Pool and that BP sold gas from the HSC Pool. It is not possible to trace gas through a pool. Mr. Clynes testified that the pool "

[456]

There are also significant mismatches in the volumes of gas that the Texas Team received at Katy Oasis, shipped to the HSC Pool, and sold from the HSC Pool. Bergin failed to address or reconcile these differences.

For example, in Example Nos. 28–32, which flowed on

BP purchased [457] of gas from a counterparty at Katy Oasis, of which [458] was supposed to be received onto HPL. BP shipped [459] to the HSC Pool. BP sold between and from the HSC Pool on those days.

); *id*. at 2360:16 – 2360:19

[455] Tr. at 2360:16 – 2360:19.

[456] Tr. at 2341:10-2341:12.

[457] *See, e.g.*, Ex. OE-073,

[458] *See, e.g.*, *id.*,

[459] *See, e.g.*, Ex. OE-071,

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In Example Nos. 48–51, which flowed on , BP purchased [460] of gas from a counterparty at Katy Oasis, all of which was supposed to be received onto HPL. BP shipped [461] to the HSC Pool. BP then sold from the HSC Pool. Bergin failed to reconcile or even address these mismatched volumes.

The mismatch of volumes along the "path" illustrate the imprecision of Bergin's methodology and demonstrates why it should not be relied upon to link subject volumes to BP's sales at HSC. In response, the ID simply assumed, for a single example only, that subject gas was sold with a larger volume of other gas at HSC and that explained the discrepancy between deliveries and sales at HSC.[462] The ID then disregarded BP's numerous other exceptions on this issue without analysis.[463] Opinion No. 549 simply accepted the ID's single conclusion as a general proposition for all exceptions, again without analysis.[464] This was error. The mismatches demonstrate that Bergin's analysis did not show sales for resale and the ID and Opinion No. 549 failed to address BP's argument on this issue.

c. Mr. Bergin's 52 "Examples" Presented on Rebuttal Are Not Tied to the Alleged Manipulation.

Bergin waited until his rebuttal testimony to present 50 additional "examples" of so-called sales for resale of interstate gas at the HSC Pool during the Investigative Period.

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460 *See, e.g.*, Ex. OE-073,

461 *See, e.g.*, Ex. OE-071,

462 ID at P 172.

463 *Id.* at P 172 n.121.

464 Opinion No. 549 at P 355.

Those examples suffer from additional deficiencies that render improper any reliance by the ID and Opinion No. 549 on them.

First, in his direct testimony, Bergin failed to allege that any of BP's transactions on 72 of the 73 days that comprise the Investigative Period were subject to the Commission's NGA jurisdiction. After expanding the number of examples from 2 to 52, Bergin still did not make any allegation of "direct sales jurisdiction" or market manipulation on 39 flow days of the 73 days in the Investigative Period.[465] Bergin's Appendix A does not include examples on the following flow dates:

For the days that Bergin failed to present an example of sales for resale, there can be no claim of manipulation. Although Opinion No. 549 repeated BP's exception and the ALJ's conclusion, the opinion did not address this argument directly.

Bergin failed to tie any of the 52 examples to the alleged manipulative scheme. Bergin did nothing more than potentially identify 52 transactions without showing how they were used for manipulation. In its initial brief, BP directly addressed the two examples in Bergin's direct testimony (Examples 1 and 2).[466] BP explained that OE failed to establish a link between the transactions and the alleged manipulative trading.[467] For example, both trades occurred well after HSC trading started – at and central time, respectively.[468] Both trades occurred after trading at the Katy

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[465] Tr. at 1595:8-1599:9.

[466] BP IB at 59-60.

[467] Ex. BP-030 at 7:18-7:22, 8:14-8:22.

[468] Ex. BP-070 at SAS dataset "dat.ice_deals_ndfp." This SAS dataset was created by Abrantes-Metz in her program "1) ICE deals import.sas." (Protected)

market started.[469] Both trades were economic, as defined by Abrantes-Metz. Both trades occurred after the fifteenth trade of the day at HSC – after 15 percent of the HSC market was traded on that trading day.[470] In other words, the only two examples that Bergin alleged to be subject to the Commission's NGA jurisdiction in his direct testimony do not reflect the manipulative characteristics that Abrantes-Metz has asserted as the basis for her alleged manipulative scheme.

The ID rejected this argument based on Abrantes-Metz's testimony that the Texas Team "changed its trading patterns" and that "these changes were 'consistent with an effort to influence other market participants and to reinforce artificial downward pressure on the HSC *Gas Daily* index.'"[471] Even though these particular transactions showed no indications of manipulation, the ID concluded that they were part of a larger scheme.[472] Opinion No. 549 merely agreed, stating "BP's proposition appears to us to be that conduct must meet *all* of Abrantes-Metz's indicia before it can be found to be manipulative." This is a straw man. BP argued that OE does not attempt to show how *any* of the indicia are met.[473] Opinion No. 549 concluded that "[i]n any event, the examples meet at least some of the indicia,"[474] citing to Ex. OE-161 (pp. 110-174) and Ex. OE-175. However, neither of those citations support Opinion No. 549's conclusion. Pages 110-174 of Ex. OE-161 contain Bergin's pathing analysis for the 52 examples; it does not explain how any of those sales exhibited Abrantes-Metz's indicia. Likewise,

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469 *Id.*

470 *Id*. at SAS dataset "deals5." This SAS dataset is created by Abrantes-Metz in her program "Table 11 – 12 and Figure 39.sas."

471 ID at P 161 (quoting Ex. OE-129 at 31:15-17).

472 *Id.*

473 BP IB at 59-60; BOE at 78.

474 Opinion No. 549 at P 357 n.816.

Opinion No. 549's two examples of sales in Ex. OE-175 do not show any indicia of manipulation.[475] Therefore, to date there has been no substantive response to BP's objections that OE has not shown that any of the 52 examples have been tied to Abrantes-Metz's indicia.

The OE and the Opinion No. 549 improperly concluded that because these 52 transactions were sales, and because sales generally were part of a putative larger scheme, that is all that is required to link jurisdiction and alleged manipulation.[476]

Opinion No. 549 concluded with the untenable argument that because increased supply decreases prices generally, *any sale* would contribute to a manipulative scheme.[477] This rationale must be rejected. Such an approach would absolve the Commission from any responsibility to link manipulative behavior to jurisdictional transactions.

d. The Commission Should Strike 50 of the 52 Examples Because OE Engaged in "Sandbagging."

Opinion No. 549 erred in concluding that "the ALJ correctly admitted into evidence all of Bergin's testimony concerning BP's jurisdictional fixed price sales, and we affirm the ALJ's finding that BP's manipulative scheme included at least 52 fixed price sales for resale subject to our NGA jurisdiction."[478]

In their direct testimony, OE provided two examples of sales they claimed were NGA-jurisdictional sales made by BP. After BP showed that both sales were non-jurisdictional and also that they did not show any indicia of market manipulation, OE

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[475] Opinion No. 549 at P 357 n.816. If the argument is that the trades are "early," no evidentiary support for that claim exists in the record.

[476] OE Staff Br. Opp. Exceptions at 60; Opinion No. 549 at PP 356-57.

[477] Opinion No. 549 at P 357.

[478] *Id.* at P 345.

introduced 50 additional examples in rebuttal testimony. These 52 examples were improperly introduced in rebuttal testimony, over BP's objection, although OE had every opportunity to introduce these materials in its case-in-chief. OE sandbagged BP, and the ID erred in relying on these improperly introduced materials.[479]

The ID and Opinion No. 549 justified the erroneous admission by finding that BP had ample time to cross-examine Bergin on the examples, that Bergin's direct testimony referred to additional examples, and that the additional examples were "cumulative."[480] This misses the mark. Commission precedent requires OE to present its case in direct testimony, and to rebut BP's arguments in rebuttal testimony; precedent does not permit OE to present its case for the first time in rebuttal testimony. BP respectfully submits that the Commission's recent decision permitting sandbagging in the context of a market-based storage rate application was wrongly decided and in any event should not be extended to the enforcement context.[481] The Commission does not condone such

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[479] *See, e.g., S. California Edison Co.*, 50 FERC ¶ 63,012 (1990).

[480] ID at P 174; Opinion No. 549 at P 346.

[481] *See ANR Storage Co*., 155 FERC ¶ 61,279 (2016). As discussed by an ALJ in another proceeding:

> When rebuttal testimony contains new direct testimony, which is not permissible in any normal context, it is procedurally unfair because opposing parties are not afforded an adequate opportunity to refute the new direct testimony (this is often referred to as "sandbagging"). The only remedy for sandbagging is to prevent it in the first instance or to allow additional rounds of testimony to answer it.
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> The core issue with the Commission's view that direct/case-in-chief and rebuttal testimony are fungible is that the rebuttal-instead-of-direct option denies the opposing party of any opportunity to comment on the new theories presented at the end of the testimonial rounds that are permissible pursuant to the procedural schedule. Procedures are established to accommodate participants in a fair manner, not to confer advantage.
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> *Opinion 538* breaks from the procedural fairness shown by the Commission in other cases based upon the meritless distinction that this is the first gas storage market-based rate application set for hearing. I find it passing strange that the order states: "the Commission recognizes that this proceeding is the first gas storage market-based rate application set for

sandbagging by private litigants and it should not condone such conduct by OE, particularly in an enforcement involving claims of market manipulation. OE should file its direct case when it is due. The ID and Opinion No. 549 erred in not striking all evidence regarding these 52 examples.

The additional examples included transactions and counterparties that were not included or identified in the first two examples. It was not enough that BP "knew" about additional examples; BP was not provided the opportunity to address those examples in testimony. Nor were they merely "cumulative."

3. The Commission does not have Jurisdiction by Virtue of 18 C.F.R. § 284.402(a).

While Opinion No. 549 assumed that the Commission has jurisdiction over sales for resale in interstate commerce pursuant to 18 C.F.R. § 1c.1 (2016), this assumption is inconsistent with the scope and limits of the blanket marketing certificates issued by operation of law to all persons who are not interstate pipelines pursuant to 18 C.F.R. § 284.402(a) (2016). Since 2003, the regulation provides:

> Any person who is not an interstate pipeline is granted a blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act authorizing the certificate holder to make sales for resale at negotiated rates in interstate commerce of any category of gas that is subject to the Commission's Natural Gas Act jurisdiction. A blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act

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hearing, and *there is no direct precedent on the procedures participants should follow*." This bootstrapping statement simply sets the stage for a departure from established Commission procedural precedent. In fact, the Commission and its predecessor agency have accumulated procedural precedent since 1930, even if the narrow facts of this case have not occurred previously.

Order Establishing Rules for the Conduct of the Hearing at App. C, PP 5-7, *Midcontinent Independent Sys. Operator, Inc.*, Docket No. EL14-19-002 (Nov. 17, 2015) (italics in original; internal notes omitted).

> jurisdiction of the Commission, other than that set forth in this Subpart L, by virtue of the transactions under this certificate.[482]

Subpart L of Part 284 of the Commission's regulations does not include 18 C.F.R. § 1c.1. Section 284.403 prevents false price reporting and establishes record retention requirements.

Even if Opinion No. 549 had established the existence of any jurisdictional sale for resale—and it did not for the reasons set forth herein—exercising jurisdiction over those transactions under 18 C.F.R. § 1c.1 is inconsistent with the express language of 18 C.F.R. § 284.402(a).[483]

G. Opinion No. 549 Erred in its Findings Concerning the Civil Penalty Statutory Factors.

Opinion No. 549 erred in adopting all of the ID's findings with respect to the OE's computations for the number of violations, estimate of market loss, and net profits. In addition, both Opinion No. 549 and the ID disregarded BP's argument that these computations are unsupported and that OE could not prove its allegations.[484] As BP emphasized on exceptions, OE was forced to significantly revise its initial disgorgement figure because it could not substantiate its estimates.[485] In the Staff Report, OE originally

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[482] 18 C.F.R. § 284.402(a) (2016).

[483] The disgorgement remedy – to say nothing of the civil penalty – effectively resets rates charged in bilateral arm's length contracts at market-based rates. Particularly in the absence of any substantiated evidence of fraud – as in the case here – repricing bilateral fixed-price trades would not be consistent with the *Mobile-Sierra* doctrine, even if the relevant underlying transactions were within the scope of the Commission's jurisdiction (and they are not). *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 348 (1956); *FPC v. Sierra Pacific Power Co*., 350 U.S. 348 (1956); *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008).

[484] BOE at 80-81.

[485] *Id.* at 80-81.

recommended that BP pay a civil penalty of $28 million and disgorge $800,000.[486] OE based these figures on (1) alleged violations on over 48 days; (2) a conclusion that the alleged violations resulted in $9,480,600 in market loss; and (3) a determination that the purported violations resulted in BP's obtaining $800,000 in unjust profits.[487]

However, because OE could not substantiate its computations, OE had to significantly retreat from these initial numbers and the ID adopted a finding of: (1) violations on over 48 days; (2) $1,375,483 to $1,927,728 in market losses, marking an 80-85% reduction from the Staff Report; and (3) between $165,749 and $248,589 in net profits, reflecting a 70-80% reduction from the Staff Report.[488] Although OE failed to support even these reduced computations, the ID incorrectly adopted them and ignored BP's evidence revealing flaws in these figures.[489]

1. Opinion No. 549 Erred in Agreeing with the ID that BP Committed a Minimum of 48 Violations.

Opinion No. 549 offered no support in the record for its finding that "based on the [unidentified] evidence" the matter involved "well over 600 violations" and "perhaps more than 900."[490] Opinion No. 549 reasoned that the amount of violations "depend[ed] on how the various transaction[s] are counted."[491] These figures exceeded even the ID's finding and OE's assertions.[492] Ex. OE-129 shows that the 680 figure is the number of

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[486] *Id.* at 80 (citing Ex. BP-004 at 78).

[487] *Id.* at 80-81.

[488] *Id.* at 81 (citing ID at PP 187, 195, 271).

[489] *Id*.

[490] Opinion No. 549 at PP 375-76.

[491] *Id.* at P 376.

[492] The ID found, in contrast, that the record supported a finding that BP committed at least 48 violations. ID at P 187.

total fixed-price sales.[493] Bid-initiated sales at HSC with an available bid at Katy within cost of transport (101) and HSC offer-initiated sales where the offer could have been lowered at Katy (129) are both subsets of the universe of fixed-price sales. The numbers are not additive. [494] The opinion emphasized that "it is fundamental to determine the number of violations and number of days," but asserted without any basis that BP could have received a penalty of "at least $716 million" based on these inexplicably new and high violation counts.[495] No meaningful explanation is offered for the finding that all fixed-price sales at HSC were per se manipulative.

Opinion No. 549 summarily concluded that, "based on the evidence," the matter "involved at least 48 violations."[496] However, the opinion failed to analyze any of BP's arguments rebutting the number of violations. Specifically, Opinion No. 549 disregarded BP's criticism on exceptions that the ID mistakenly adopted OE's recommendation that BP engaged in 48 violations on over 48 days because BP was a net seller at HSC during each of the 48 days.[497] As BP asserted on exceptions, net selling is not manipulative conduct and the ID failed to cite to any precedent for such proposition.[498] Opinion No. 549 also disregarded the fact that BP could not have engaged in the manipulative scheme on 48 days because its physical trading was profitable on over 40 percent of the days in the ID. Further, as noted above, the ID and Opinion No. 549 rely expressly on alleged

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493 Ex. OE-129 at 150, Table 18.

494 Nor do they reflect any sustainable claim of manipulation.

495 Opinion No. 549 at PP 375-76.

496 *Id.* at P 376.

497 BOE at 81 (citing ID at P 187).

498 *Id.*

changes in trading patterns after November 5 to support a finding of scienter.[499] At the same time, in the context of remedies, Opinion No. 549 asserts the opposite—the scheme continued throughout November. This finding is arbitrary and capricious.

Opinion No. 549 also disregarded without any explanation BP's challenge on exceptions that the ID erred in adopting Abrantes-Metz's quantification of the "four pieces of factual information."[500] Abrantes-Metz calculated: (1) the number of days in the IP on which the Texas Team was a net seller at HSC; (2) the number of fixed-price sales by the Texas Team at HSC; (3) the number of times that the Texas Team made sales at HSC by hitting bids when the best available contemporaneous bid at Katy was within the cost of transport; and (4) the number of times the Texas Team made sales at HSC by having their offers lifted when they could have lowered their offers at Katy and sold more economically.[501] BP argued on exceptions that OE appeared to incorrectly assume that each of these calculations indicated violations of the Anti-Manipulation Rule. Moreover, BP asserted, the ID's finding confirmed this incorrect assumption.[502]

Opinion No. 549 further erred in concurring with the following ID findings—all addressed on exceptions. The ID improperly concluded, without support or explanation, that the 680 fixed-price sales at HSC furthered the manipulative scheme.[503] As BP argued on exceptions, neither the Commission nor the NGA prohibit making fixed-price sales, selling at the beginning of a trading session, or selling via offer-initiated

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499 Opinion No. 549 at P 203.

500 BOE at 81 (quoting ID at PP 186-87).

501 Ex. OE-129 at 149:9-149:19.

502 BOE at 81-82.

503 *Id.* at 82 (citing ID at P 187).

transactions. Accordingly, the premise underlying the finding of 48 violations is incorrect.

2. Opinion No. 549 and the ID Erred in Adopting OE's Estimate of Loss.

Opinion No. 549 further erred in concurring with the ID's findings on the estimate of loss.[504] The opinion limited its findings on loss to a single paragraph and failed to specifically address any of the loss arguments, described as follows, that BP raised on exceptions.[505]

Without explanation, the ID disregarded BP's arguments that OE's estimates were unreliable and "without merit."[506] Moreover, the ID incorrectly ignored BP's argument that Abrantes-Metz's price impact analysis was fatally flawed and contained an abnormally high amount of uncertainty.[507] For example, Abrantes-Metz's range of estimates for artificial prices in September 2008 was $0.0012 to $0.0081, which demonstrates a high estimate that is more than six times the low estimate.[508] Besides being unacceptably imprecise expert testimony with respect to accuracy and statistical confidence levels, the estimate also fails to control for (i) changes in price at the related Texas/Gulf area, or (ii) any other basic control variables of fundamental supply and demand, which are common in models assessing market price impacts.[509]

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504 Opinion No. 549 at P 382.

505 *Id.*

506 ID at P 195.

507 Ex. BP-037 at 65:8-68:15.

508 *Id.* at 67:14-67:16.

509 BOE at 83.

In addition, Ronn subsequently incorporated into his calculations Abrantes-Metz's estimates from her flawed impact analysis. Ronn's calculations also incorrectly included the financial impact of trades that OE did not assert were jurisdictional or manipulative.[510] Moreover, Ronn ignored the fact that Bergin identified only 24 trade days on which purportedly jurisdictional sales were made.[511] However, Opinion No. 549 incorrectly concluded that OE had proven that every trade was, at a minimum, "in connection with" jurisdictional transactions because each trade made as part of the purportedly manipulative scheme affected an index.[512] Opinion No. 549 reasoned that this affected the index, which in turn, impacted the price of jurisdictional transactions.[513]

Ronn's calculations also included days in which BP's physical trading was profitable, thereby contradicting the alleged scheme. His calculations included Katy-priced trades, which artificially inflated the alleged market harm computations.[514] OE never asserted and Abrantes-Metz never found that BP engaged in manipulative conduct at Katy.[515] Ronn's inclusion of Katy-priced trades contradicts Bergin's calculation of alleged unjust profits, which excluded purported losses to BP's Katy physical sales and financial exposures (which would have reduced Bergin's purported unjust profits).

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510 *Id.*

511 As BP noted on exceptions, Bergin did not allege that any jurisdictional sales occurred after November 5, 2008. However, Ronn included sales from another 20 days, November 6-25, in his calculation. BOE at 83.

512 Opinion No. 549 at P 382.

513 *Id.*

514 BOE at 84 (citing Ex. OE-155 at 11:9-15:3).

515 BOE at 84.

However, the ID failed to reconcile inconsistencies between Bergin's and Ronn's computations.[516]

The ID also mistakenly ignored BP's argument that it was improper to consider the price impact for trades at Katy. In addition, the ID failed to explain why Ronn's determination was reasonable that prices were impacted.[517] Ronn failed to provide any evidence for his conclusion and the ID failed to cite to any evidence to support the finding.[518]

In addition, the ID erred in adopting Bergin's computation of natural gas volumes, which BP asserted was significantly overstated.[519] Bergin failed to limit his calculation to days on which Abrantes-Metz asserted manipulative activity and days that Bergin argued involved jurisdictional transactions.[520] Instead, Bergin calculated the volume of all of BP's physical and financial natural gas positions for the IP.[521] Moreover, Bergin's computations included volumes from at least 49 trade days that did not reflect jurisdictional trading.[522]

3. Harm to the "Market"

In an effort to defend its jurisdictional position, Opinion No. 549 stated:

> In short, since Congress imbued it with new anti-manipulative authority, the Commission has always interpreted the scope of this authority solely in terms of its jurisdictional markets, and as such any effect on non-

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516 *Id.*

517 BOE at 84 (citing ID at P 195).

518 BOE at 84.

519 BOE at 84 (citing ID at P 196).

520 BOE at 84.

521 *Id.*

522 *Id.*

> jurisdictional activities is merely incidental to this protective function.[523]

Opinion No. 549's treatment of both disgorgement and harm to the market belie this assertion.

Opinion No. 549 put forth three alternative jurisdictional theories. First, Opinion No. 549 claimed that BP's conduct affected 46 index transactions. As noted above, the volumes associated with those transactions were only 0.95 percent (September 2008), 0.22 percent (October 2008), and 2.9 percent (November 2008) of the third party intrastate open positions used to calculate harm to the market. [524]

Opinion No. 549 identified a second jurisdictional market: the Northern cash-out index that used HSC *Gas Daily* index prices along with prices at another unrelated index point to generate a new separate weekly average cash-outs price that was then used to generate a monthly composite index. How do the volumes associated with this jurisdictional market compare to those used to compare harm to the market? 0.23 percent (September 2008), 0.03 percent (October 2008), and 0.08 percent (November 2008).[525]

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[523] Opinion No. 549 at 301.

[524] *See* Ex. OE-161, Appendix B, nn. 1-45

[525] Ex. OE-173 (Protected), at 29 (providing volume data for referenced imbalances); Ex. OE-155 at 15 Table 1

As noted above, the 52 "examples" addressed by OE as to BP were not shown to be sales for resale in interstate commerce or to meet any of the hallmarks of manipulation identified by Abrantes-Metz. Opinion No. 549 (erroneously for the reasons stated above) contended that two transactions by BP of the alleged 52 "jurisdictional sales" had at least one hallmark of manipulation. The total volume of these allegedly jurisdictional sales was MMBtu, compared to the approximately 10.6 billion cubic feet of natural gas sales by BP at issue in this proceeding.[526]

What, then, is the market Opinion No. 549 claimed has been harmed? The physical market is the open interest at Katy and HSC ***excluding BP's own trades***. OE has not ***alleged*** or ***proven*** that ***any*** of these trades—let alone all of them—are anything other than intrastate trades. Opinion No. 549 alleged that the impact of the Commission's regulation on intrastate markets is "merely incidental."[527] This cannot be squared with what Opinion No. 549 did: mandate disgorgement of intrastate profits and calculate losses to the ***intrastate*** market.

Moreover, particularly given the complete absence of any evidence of any jurisdictional physical sales, taking into account any alleged harm associated with purely financial trades exceeds the jurisdiction of the Commission, under *Hunter v. FERC*.[528]

4. Opinion No. 549 Erred in Concurring with the ID's Gross Profits Findings.

While Opinion No. 549 stated that the disgorgement range is "reasonable," the record evidence shows that it is not. To be reasonable, a disgorgement estimate must at

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[526] Ex. OE-001 at 117:11-15.

[527] Opinion No. 549 at 301.

[528] *Hunter*, 711 F.3d 155.

least be transparent and internally consistent. The estimate adopted in Opinion No. 549 is neither.

First, BP demonstrated on exceptions that Bergin's profit computations yielded distorted and misleading profit calculations because he used a combination of hypothetical variables and actual pricing data. As a result, he omitted or replaced relevant information and failed to accurately reflect the effect of BP's trading activities.[529] In addition, Bergin applied Abrantes-Metz's false price impact analysis, which failed to reflect a historical period despite the high degree of uncertainty underlying the artificial price estimate.[530]

Second, Bergin's historical P&L analysis included only selected BP positions.[531] As BP argued on exceptions, this obscured other positions related to the overall strategy which, in turn, distorted the portfolio's financial performance compared to the actual P&L and misrepresented the true risks of the portfolio. In addition, Bergin's historical P&L analysis of BP's financial positions improperly focused only on BP's HSC to Henry Hub swing spread position. By excluding BP's other positions, Bergin's analysis lacked a complete and reliable measure of the Texas Team's strategy and P&L.[532] On exceptions, BP emphasized the ID's failure to address this argument, among others, and

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[529] BOE at 85.

[530] *Id.*

[531] Ex. BP-037 at 69:3-71:14.

[532] BOE at 85. Moreover, as BP noted on exceptions, Bergin acknowledged that his analysis calculated only the spread positions that he believed "would benefit from suppression of the HSC *Gas Daily* index" and that his analysis "focused on the Texas team's short HSC to long Henry Hub spread position." Ex. OE-161 at 15:13-15:16.

its incorrect finding that "BP did not dispute the use of the total HSC *Gas Daily* exposure to derive gross profits."[533] Opinion No. 549 failed to even mention these BP assertions.

Opinion No. 549 also disregarded BP's argument, raised on exceptions, that Bergin's historical P&L analysis was fundamentally flawed because it used actual P&L. Bergin's analysis should have employed incremental P&L to exclude the broader price movements that would have affected P&L regardless of the alleged manipulative impacts.[534] Bergin's flawed analysis was further demonstrated by Abrantes-Metz's concession that expert computations focus on incremental P&L.[535]

In addition, Opinion No. 549 incorrectly disregarded the fact that Bergin's but-for analysis improperly used an illogical combination of hypothetical gains and actual losses. This resulted in a combination of real pricing data outcomes and counterfactual estimates.[536] The ID ignored this on the mistaken grounds that the Commission sanctioned hypotheticals in *Barclays*.[537] In fact, *Barclays* did not sanction hypotheticals.[538]

Moreover, Opinion No. 549 and the ID failed to reconcile the fact that Bergin's but-for analysis contradicted Ronn's market impact calculations. The results of Bergin's but-for analysis did not reflect as factors additional alleged losses from BP's physical

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533 BOE at 85 (quoting ID at P 273).

534 Ex. BP-037 at 71:13-72:3.

535 *Id.*

536 BOE at 86.

537 ID at P 273.

538 *Barclays Bank, PLC*, 144 FERC ¶ 61,041 (2013).

sales and financial exposures at Katy.[539] However, Ronn concluded that prices at Katy were artificially low because of the same pricing artificiality at HSC.[540]

Opinion No. 549 wrongly concluded that because OE's approach to gross profits was reasonable, the ID did not need to address alternative methodologies provided by BP.[541] It erred in summarily concluding that BP's alternative approaches were not more reasonable than OE's approach.[542]

First, Opinion No. 549 adopted OE's position that Evans' estimate of a hypothetical P&L that relied on the assumption that BP should have sold all its volumes at Katy (eliminating entirely the alleged uneconomic intrastate transportation) should be rejected because OE claimed it "never suggested BP should always have sold volumes at Katy instead of Houston Ship Channel."[543] This is inconsistent with the finding of Opinion No. 549 that ***all*** BP fixed-price sales at HSC were "manipulative."[544] OE, the ID and Opinion No. 549 each specifically maintained that all deliveries to HSC were part of a manipulative scheme even if they did not exhibit ***any*** of the indicia of manipulation under the NGA.[545] While this contention cannot be reconciled with the record, the NGA or the APA, it also undercuts the dismissal of Evans' critique, entirely.

Second, Evans calculated a P&L estimate that removed BP's trades from the index ("but-for" index approach). OE, the ID and Opinion No. 549 improperly

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539 BOE at 86.

540 Ex. OE-155 at 12:1-12:4.

541 Opinion No. 549 at P 368 n.858. These three alternatives were addressed in Evans' testimony. BOE at 87 (citing Ex. BP-037 at 72:5-78:16).

542 Opinion No. 549 at P 367 n.858.

543 Opinion No. 549 at P 365.

544 *Id.* at P 376.

545 *Id.*; ID at P 187; Enforcement Staff Brief Opposing Objectives at 67-68.

disregarded this result by stating that the but-for index price ignores "informational" and "volumetric" effects of BP's trading.[546] No evidence to support this contention, beyond this ***mere assertion***, was offered. This finding was not supported by substantial evidence and was not the product of reasoned decision-making.

Third, Opinion No. 549 rejected Evans' third alternative because it allegedly double-counted BP's losses.[547] This was incorrect. Evans conducted the calculation, for consistency's sake to make a point, the same way Abrantes-Metz calculated BP's losses. Thus, it is Abrantes-Metz's original double counting to which Opinion No. 549 unknowingly refers. Abrantes-Metz based her artificiality estimate on only four factors (not the entire litany of duplicative and irrelevant metrics comprising the alleged confluence of factors). One factor was the alleged excessive intrastate transportation volume at HSC. A second was the shift to earlier sales. These effects were ***added*** by Abrantes-Metz to generate her artificiality measure. Evans did not err in this respect. Separately, Opinion No. 549 rejected the third Evans alternative because it was different from his profit and loss against the index calculation.[548] Of course it was. The calculations were based on alternative methodologies. OE's experts offered alternative methodologies, those which produce unacceptably wide ranges of estimated P&L. The existence of multiple approaches, alone, provides no basis upon which to reject Evans' third alternative.

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[546] Opinion No. 549 at P 48 n.92; ID at P 274; BOE at 87-88.

[547] Opinion No. 549 at P 368, n.858.

[548] *Id.*

Fourth, Opinion No. 549 independently found that it was not necessary to require that BP's transport losses between Katy and HSC be considered.[549] However, the same portion of Opinion No. 549 recognized that it is fully appropriate to deduct losses associated with physical trades claimed to be manipulative.[550] Opinion No. 549 advanced no reasoned basis whatsoever to warrant disparate treatment between sales losses and transportation losses in computing alleged unjust profits.

Opinion No. 549 ultimately affirmed as reasonable OE's calculation of gross gains of between $233,330 and $316,170 and net gains of between $165,749 and $248,589.[551] Ignoring BP's challenge to these figures on exceptions, the opinion accepted without further explanation the accuracy of these figures and mandated disgorgement at the midpoint of the range: $207,169.[552]

BP submits this finding is contrary to the record evidence and not the product of reasoned decisionmaking. For the reasons stated in detail in this request for rehearing, the base determination that BP engaged in market manipulation is contrary to law and is not supported by the evidence in this case. Moreover, none of the BP transactions at issue in this case have been shown to be subject to the Commission's jurisdiction under the NGA, putting to one side the apparent conflict between 18 C.F.R. § 1c.1 and 18 C.F.R. § 284.402. Further, particularly given the absence of any evidence showing that any jurisdictional physical transactions were used to effectuate the alleged manipulation,

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549 *Id.*

550 *Id.* at P 367.

551 *Id.* at P 368.

552 Opinion No. 549 at P 368.

consideration of alleged profits associated with financial trades is precluded under *Hunter v. FERC*.[553] The Commission has no jurisdiction over purely financial trading.

H. Opinion No. 549 Erred in its Consideration of the Penalty Guidelines Factors.

1. Opinion No. 549 Erred in Affirming the ID's Decision that Prior Settlements are Adjudications for Purposes of Applying the Penalty Guidelines.

Opinion No. 549 erred in affirming the ID's finding that the three prior settlements should be treated as adjudications. Despite first stating that the Penalty Guidelines are "merely advisory," Opinion No. 549 cited no "authority" on which it relied to conclude that prior BP's settlements constitute adjudications,[554] and instead rested this determination entirely upon the Guidelines.[555]

Moreover, policy statements provide notice of an agency's views and "give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances."[556] If an agency applies a policy statement in a particular case, it "must be prepared to support the policy just as if the policy statement had never been issued."[557] Because Opinion No. 549 applied the Guidelines to BP, it could not limit its articulated support for such application to the fact that, in the *Revised*

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553 *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013).

554 *See* Opinion No. 549 at PP 388-90.

555 Opinion No. 549 at P 388. Opinion No. 549 states that the Penalty Guidelines "were promulgated to assist the Commission in assessing penalties according to the relevant statutory factors enunciated in Section 22(c) of the NGA: (1) 'the nature and seriousness of the violation' and (2) 'the efforts to remedy the violation.'" *Id*. (quoting 15 U.S.C. § 717t-1(c)).

556 *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999).

557 *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) ("An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.").

Policy Statement on Penalty Guidelines, "the Commission rejected the 'suggestion that we not treat prior settlements as adjudications.'"[558]

In *Pickus*, the D.C. Circuit affirmed the district court's holding that the Board of Parole's ("BOP") guidelines for considering parole eligibility were void because they failed to comply with the APA's notice and comment requirement.[559] The court stated that:

> [a]lthough they provide no formula for parole determination, [the guidelines] cannot help but focus the decision-maker's attention to the Board-approved criteria. [The BOP] thus narrow [the] field of vision, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significance might have been differently articulated had Section 4 been followed.[560]

Similar to *Pickus*, Opinion No. 549 attempted to characterize the Penalty Guidelines as "policy" but to apply them as binding precedent – without the benefit of and protections provided by public notice and the opportunity for comment.

There is no authority other than the Penalty Guidelines for treating settlements as an adjudication.[561] Both Opinion No. 549 and the ID erred in ignoring case law contradicting OE's position and disregarded the fact that there is no record evidence to

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[558] Opinion No. 549 at P 389 (quoting *Enforcement of Statutes, Regulations and Orders, Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 at P 162 (2010)).

[559] *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1108 (D.C. Cir. 1974).

[560] *Id*. at 1113.

[561] *See SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 295 (2d Cir. 2014):

> "Trials are primarily about the truth. Consent decrees are primarily about pragmatism … [and] are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation. Thus, a consent decree must be construed as . . . written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. Consent decrees provide parties with a means to manage risk."

(internal quotations and citations omitted).

support the ID's finding.[562] They also ignored the fact that Commission orders approving settlements routinely state that they do not constitute approval of or precedent regarding any principal or issue in the proceeding.[563] Opinion No. 549 also failed to acknowledge BP's argument on exceptions that the Commission has not undertaken a rulemaking or implemented a policy through an individualized adjudication that prior settlements are adjudications for purposes of a penalty assessment. The Commission cannot treat BP's prior settlements as adjudications merely by articulating its view in a policy statement. Accordingly, the application of the Penalty Guidelines to equate settlements with adjudications was not proper.

Opinion No. 549 and the ID erred in treating the three settlements as adjudications. The 2007 capacity release settlement between BP Energy Company and the Commission involved conduct unrelated to the conduct at issue in this proceeding. In addition, the Consent Order entered into in the federal district court for the Northern District of Illinois involved BP Products North America Inc. ("BPPNA"), which is not a respondent in this proceeding.[564] BPPNA relied on the express terms of the Consent Order that it was a "settlement between the parties without a trial on the merits or further

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[562] *See Airport Comm'n of Forsyth County v. Civil Aeronautics Bd.*, 300 F.2d 185, 188 (4th Cir. 1962) (rejecting a challenge alleging that an agency's order was improperly based on a previously issued policy statement because the agency's decision was "based upon substantial [record] evidence" and not merely reliance on the policy statement).

[563] *Amaranth Advisors LLC*, 128 FERC ¶ 61,154, at P 17 (2009) ("The Commission's approval of this Settlement does not constitute approval of or precedent regarding, any principle or issue in this proceeding or any other proceeding"); *Enron Power Marketing Inc.,* 122 FERC ¶ 61,015 (2008); *Herbert D. Patrick*, 53 FERC ¶ 61,006 (1990); *H. Bruce Cox*, 90 FERC ¶ 63,006 (2000); *Ozark Gas Transmission System*, 40 FERC ¶ 61,129 (1987); *Columbia Gas Transmission System Corp*., 39 FERC ¶ 61,245 (1987); *Amoco Production Co.*, 35 FERC ¶ 61,375 (1986), *modifying*, 45 FERC ¶ 61,371 (1988).

[564] *CFTC v. BP Products North America Inc*., Consent Order for Permanent Injunction and Other Relief, Dkt. No. 06-3503 (N.D. Ill. Oct. 25, 2007) ("Consent Order").

judicial proceedings"[565] and had no expectation that by entering into the Consent Order it would carry with it a prior history or "an adjudication." Moreover, the Deferred Prosecution Agreement ("DPA") was dismissed upon a motion of the U.S. Department of Justice because the respondent: (1) fully complied with its financial obligations set forth in the DPA, (2) satisfied its obligations to improve its compliance policies and procedures for its commodity trading operations as certified by the Independent Monitor, and (3) did not materially violate the DPA's terms.[566]

2. Opinion No. 549 Erred in Retroactively Applying the Policy Statement on Penalty Guidelines Insofar as it Affects Prior Settlements.

Opinion No. 549 also erred in retroactively applying the Revised Penalty Guidelines, issued on September 17, 2010, to settlements that were entered into in 2007.[567] The Commission did not contemplate treating settlements as prior adjudications until 2010.[568] The Revised Penalty Guidelines reflect a significant deviation from prior Commission policy by raising, for the first time, the possibility of treating settlements as adjudications.

Opinion No. 549 further erred in finding that "[s]ince the Guidelines are merely a means by which the Commission achieves the assessment that Congress directed,

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[565] Consent Order at 5.

[566] Ex. BP-005 at P 15.

[567] Opinion No. 549 at P 388.

[568] *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (2008); *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

applying them here does not implicate questions about retroactive rulemaking."[569] By applying the Guidelines to settlements pre-dating them, Opinion No. 549 undermined the purpose of policy statements—to provide notice and an opportunity for the public "to contemplate an agency's views before those views are applied to particular factual circumstances."[570] This is retroactive rulemaking.

Moreover, Opinion No. 549 engaged in unreasoned decisionmaking because it failed to adequately explain the basis for its departure from the policy statement based upon the cursory and unreasoned assertion that the statement is not binding. An agency's duty to explain its reasoning is not so easily brushed aside. To withstand judicial scrutiny, Opinion No. 549 must explain *why* it has departed from the Commission's Policy Statement. As the United States District Court for the District of Columbia explained recently, "the Agenc[y's] actions are short on rationality . . . the [agency's] decision to disregard its own guidance is tantamount to the inconsistent treatment of similar situations. Simply put, the [agency's] nonbinding guidelines state one thing, while the [agency] is doing another."[571] Such an unexplained departure fails to meet the requirements for reasoned decisionmaking.

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[569] Opinion No. 549 at P 388. This conclusion also contradicts prior consent orders in which the Commission expressly refrained from applying the Penalty Guidelines to settlements that pre-dated them; *see, e.g.*, *S. Jersey Gas Co. S. Jersey Res. Grp., LLC*, 132 FERC ¶ 61,266 at P.1 n.1 (2010) ("[b]ecause South Jersey and staff had already begun settlement negotiations before the Revised Policy Statement was issued, the Penalty Guidelines are not applicable."); *and RRI Energy, Inc. RRI Energy Wholesale Generation, LLC*, 132 FERC ¶ 61,267 P.1 n.1 (Sept. 27, 2010) (same).

[570] *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999) ("This advance-notice function of policy statements yields significant informational benefits, because policy statements give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances.").

[571] *Sierra Club v. Salazar*, No. 10-1513, __ F. Supp. 3d ___, 2016 WL 1436645, at *19 (D.D.C. Apr. 11, 2016) (notice of appeal filed June 13, 2016 as Case No. 16-5168).

3. Opinion No. 549 Erred in Treating Settlements Involving Other Entities as Settlements Entered into by the BP Respondents.

Opinion No. 549 further erred by concurring with the ID that it is appropriate to "pierce the corporate veil" and disregard formal corporate separation to find that the CFTC settlement entered into by BPPNA counted as a prior adjudication for BP – despite the fact that BPPNA is not a respondent in the proceeding.[572]

BPPNA was included in OE's November 12, 2010 Preliminary Findings Letter.[573] In its response thereto, BP noted that BPPNA was not a proper respondent and had not executed any third party trades at any pricing point subject to the investigation.[574] BPPNA was not listed as a respondent in the Order To Show Cause[575] or the Order Setting Hearing.[576] However, the ID and Opinion No. 549 sought to bring BPPNA back into the case by a veil piercing rationale that is contrary to long-standing Commission precedent.

Opinion No. 549 summarily concluded that:

> [t]he ALJ held, and BP did not contend otherwise, that the Commission has authority to disregard the corporate form when necessary to achieve the purposes of the statute. BP did not persuade the Commission to find otherwise, and the interests of justice and appropriate deterrence militate in

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[572] BOE at 91 (citing ID at P 218). As noted on exceptions, the ID cited to inapplicable cases as purported support for applying BPPNA's settlements with the CFTC and DOJ against BP. *See, e.g., San Diego Gas & Elec. v. Sellers of Mkt. Energy & Ancillary Services*, 127 FERC ¶ 61,269 at P 221 (2009), *order clarifying on reh'g*, 131 FERC ¶ 61,144 (2010) (related to affiliate transactions for cost offset purposes).

[573] Ex. BP-003 at 1.

[574] Ex. BP-013 at l n.1.

[575] *BP America Inc.*, Order To Show Cause and Notice of Proposed Penalty, 144 FERC ¶ 61,100 (2013) ("Order to Show Cause").

[576] *BP America Inc.,* Order Establishing Hearing, 147 FERC ¶ 61,130 (2014).

> favor of treating the prior settlements as applicable under this factor.[577]

First, although BP conceded that the Commission may disregard the corporate form if it can even establish an adequate evidentiary basis to do so, BP noted that this is an extraordinary procedure, not to be used lightly, and that "[s]uch extraordinary circumstances do not exit here."[578] Second, the assertion that "BP did not persuade the Commission to find otherwise . . ." is not a sufficient basis for involving the extraordinary procedure.

Although Opinion No. 549 suggested that piercing the corporate veil is commonplace, the Commission is reluctant to disregard the corporate form. As an administrative law judge has noted:

> "[g]enerally speaking, the decision to pierce the corporate veil is made cautiously and is not based on a single factor, whether undercapitalization, disregard of corporate formalities, or sole ownership. Instead, it must rest on many such factors, and the situation must present an element of injustice or fundamental unfairness."[579]

Accordingly, "[i]n light of the Commission's reluctance to pierce the corporate veil," the ALJ in *Midwest Independent Transmission System Operator, Inc.*, found an insufficient basis on which to do so based on evidence that BP Energy owned 24.5 percent of Green Mountain Power's stock and that Green Mountain Power was governed by former and current BP Energy executives.[580]

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[577] Opinion No. 549 at P 390.

[578] BOE at 91.

[579] *Midwest Independent Sys. Operator, Inc.*, 116 FERC ¶ 63,030 at P 567 (2006) (Cintron, J.), (quoting *William Valentine and Sons, Inc.*, 46 FERC ¶ 61,252 at 61,750 (1989)), *reversed on other grounds* 131 FERC ¶ 61,173 (2010).

[580] *Midwest Independent Sys. Operator, Inc.*, 116 FERC ¶ 63,030 at P 567.

Neither Opinion No. 549 nor the ID provided any basis for concluding that disregarding the corporate form is necessary to avoid frustrating the purpose of Section 4A. Nor is there any evidence of "injustice" or fundamental unfairness that would justify such an action. To the contrary, the only reason for doing so is to increase the penalties assessed against BP.

In addition to being contrary to long-standing Commission precedent, Opinion No. 549's disregard of BP's corporate structure for purposes of prior adjudication directly contradicted the Commission's express language in the commentary section of its Revised Penalty Guidelines. As the Commission explained:

> in determining the prior history of an organization with separately managed lines of business, ***only the prior conduct or record of the separately managed line of business involved in the instant violation is to be used***. A "separately managed line of business" is a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business.[581]

Opinion No. 549's unexplained departure from its previous announcement regarding how this provision of the Penalty Guidelines would be applied constituted error.[582]

4. Opinion No. 549's Determination that BP Violated an Injunction Lacked Reasoned Decisionmaking.

Opinion No. 549 improperly erred in affirming the ID's finding that BP's alleged conduct violated a CFTC injunction issued against BPPNA in 2007.[583]

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[581] Penalty Guidelines at Commentary, P 5 (emphasis added).

[582] *See Sierra Club*, 2016 WL 1436645, at *19 (D.D.C. 2016) (emphasizing the agency's "disregard [of] its own guidance" as indicative of its inconsistent, unreasoned decisionmaking); *Ne. Energy Associates v. FERC*, 158 F.3d 150 (D.C. Cir. 1998)(remanding to FERC a suspension order so that FERC could justify or remedy its departure from precedent and policy).

[583] Opinion No. 549 at P 396.

Although Opinion No. 549 posed the question as "whether the conduct is prohibited by the plain language of a prior order,"[584] it ignored that plain language in applying this provision of the Penalty Guidelines. Opinion No. 549's assertion that it was unnecessary to find that the conduct at issue here violated the CEA in order to find that the conduct violated the Consent Order ignores the plain language of the Consent Order.

Opinion No. 549 incorrectly stated that the Consent Order contained some general prohibition against "manipulating any commodity . . . ."[585] To the contrary, the Consent Order expressly, ***and very specifically***, enjoined BPPNA from violating "Section 6(c), 6(d), and 9(a)(2) of the [CEA]:"

> [P]ermanently restrained, enjoined, and prohibited from directly or indirectly engaging in any conduct that violates Section 6(c), 6(d), and 9(a)(2) of the [**CEA**] including [m]anipulating or attempting to manipulate the price of any commodity in interstate commerce or for future delivery on or subject to the rules of a registered entity; and … [c]oncerning or attempting to corner any commodity in interstate commerce.[586]

Thus, in order to find a violation of the Consent Order it would have been necessary to find a violation of Sections 6(c), 6(d), or 9(a)(2) of the CEA as those provisions existed prior to the enactment of the Dodd-Frank Act. There is no such record evidence nor could there be. Neither the Commission nor the ALJ has, or ever had, any jurisdiction to

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584 *Id.*

585 *Id.* The order asserted that "[i]n loosely analogous circumstances, federal courts may use criminal conduct for which the defendant has not been convicted to enhance penalties under the Sentencing Guidelines." *Id.* at P 383 n.900. However, the cases it cited are inapposite because they concluded that acquitted conduct could enhance a defendant's sentence where the acquitted conduct relates to the manner in which the defendant committed the crime of conviction. *Id.* (citing *United States v. Smith*, 370 F. App'x 29, 37-38 (11th Cir. 2010); *United States v. Ashqar*, 582 F.3d 819, 823-25 (7th Cir. 2009)). In contrast to those cases, the alleged conduct underlying the 2007 settlements was wholly unrelated to the purported conduct – in 2008 – at issue in this proceeding.

586 Consent Order at P 83.

find that conduct violated Sections 6(c), 6(d) or 9(a)(2) of the CEA. The plain language of the Consent Order cannot be ignored for purposes of expediency.

Opinion No. 549 also erred in disregarding BP's argument on exceptions that the record lacked any evidence that the district court found that its Consent Order was violated. Because the Commission and the ALJ lacked authority to adjudicate violations of Sections 6(c), 6(d), or 9(a)(2) of the CEA there could be no conclusion that the Consent Order was violated absent such a finding by the district court. Opinion No. 549's determination to find a violation of the Consent Order is further underscored by its conclusion that it could find a violation of the Consent Order even though the DOJ rescinded the Deferred Prosecution Agreement accompanying the Consent Order because BP complied with its terms.[587]

Opinion No. 549 also erred in failing to address BP's argument, raised on exceptions, that the injunction did not even apply to the BP respondents in this proceeding and that the terms of the Consent Order clearly define "BP" as BPPNA.[588]

For all of these reasons, Opinion No. 549's application of this factor was error.

5. Opinion No. 549 Erred with Respect to its Conclusions About BP's Compliance Program.

Notwithstanding the Commission's assurances that "[a]chieving compliance, not assessing penalties, is the central goal of our enforcement efforts,"[589] Opinion No. 549 sends a powerful message to the industry: Regardless of how many millions of dollars

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[587] Opinion No. 549 at P 396.

[588] Consent Order at P 2. As BP noted, although the Consent Order is binding on any subsidiary or business group of BPPNA that operates with or provides services for BPPNA, the BP respondents are not subsidiaries of BPPNA.

[589] *Policy Statement on Compliance*, 125 FERC ¶ 61,058 at P 1 (2008) ("Policy Statement on Compliance").

and thousands of person hours are spent on compliance efforts, those efforts will be completely disregarded in a subsequent enforcement proceeding based on nothing more than hindsight and petty observations that certain reports "could have been improved" or that a single report – out of thousands – was not followed up on.[590] Opinion No. 549's conclusions regarding the effectiveness of BP's compliance program were not supported by evidence and were inconsistent with Commission statements regarding compliance. Although BP addressed those infirmities at length in its Brief on Exceptions,[591] Opinion No. 549 cavalierly dismissed those arguments without any analysis at all in a total of two sentences.[592] Simply stating that "we are not persuaded by BP's objections . . ." is not reasoned decision making required by the APA.[593]

Opinion No. 549 completely ignored OE's statements that BP's compliance program "reflected applicable industry practices," BP "provided the compliance program with sufficient resources,"[594] "BP had an effective compliance program," and "BP did have a significant compliance program."[595] Opinion No. 549 likewise ignored the fact that OE previously gave BP credit for self-reporting and instead inconsistently denied BP such credit without any explanation.[596]

The purported justification for this change of heart as discussed in Opinion No. 549 was that Enforcement Staff discovered "serious deficiencies in BP's compliance program in early 2009 . . ." and BP's production of legible copies of certain compliance

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590 ID at P 242.

591 BOE at 92-100.

592 Opinion No. 549 at P 402.

593 *Id.* at P 396.

594 Ex. BP-003 at 29.

595 Ex. BP-004 at 77, n.212.

596 Opinion No. 549 at P 406.

reports.[597] However, the OE statements cited above were all made ***after*** 2009, so that cannot form the basis for the change. Similarly, it strains credulity to believe that OE investigated this matter for five years and only then discovered that certain documents were supposedly illegible and that this somehow completely changed OE's view.

Opinion No. 549 failed to address BP's argument that OE's prior statements are admissions by a party opponent under Rule 801(d)(2), which is premised on the principle that "a party should be entitled to rely on its opponent's statements."[598] Even accepting the post hoc rationalization for OE's change of heart, Rule 801(d)(2) contains no exception for "facts not known" before the statement is made.[599]

The answer cannot be, as OE asserted in its Brief Opposing Exceptions, that "the Federal Rules of Evidence are not binding on the Commission."[600] Opinion No. 549 affirmed the ID's finding, albeit incorrect, that the November 5 call was an admission against interest.[601] Such uneven application of evidentiary rules does not comply with the requirements of the APA.

BP devoted numerous pages in its Brief on Exceptions, and cited to substantial record evidence, regarding the factors the Commission has said should be evaluated in

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[597] *Id.* at P 400.

[598] FED. R. EVID. 801(d)(2) (quoting *Jewel v. CSX Transp., Inc.*, 135 F.3d 361, 365 (6th Cir. 1998) (internal citation omitted)). Under Rule 801(d)(2), an admission by a party opponent is one that is offered against an opposing party and:

> "(A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; [or] (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed . . . ."

[599] BOE at 93.

[600] OE Brief Opposing Objections at 78.

[601] Opinion No. 549 at P 227.

reviewing the effectiveness of a compliance program.[602] Opinion No. 549 failed to address any of these.

Furthermore, the Commission has acknowledged that assessing the effectiveness of a compliance program is far broader than simply viewing it in light of an alleged violation:

> We also recognize that even the best efforts, fully and actively supported by senior management, may still not avoid a violation . . . .However, it is possible to assess in general the degree to which a company demonstrates consistent serious commitment to preventive compliance measures, and demonstrates that its compliance program generally satisfied the relevant actions identified in our Revised Policy Statement.[603]

However, the factors cited in the ID (and approved in Opinion No. 549) all relate to the conduct at issue here. There was no effort to assess the effectiveness of BP's compliance program in broader terms. This was error.

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

Opinion No. 549 affirmed, without explanation, the ID's treatment of the factors for assessing a compliance program. The ID erroneously found (and Opinion No. 549 affirmed) that "BP failed to have strong internal standards that would prevent and detect violations"[604] and that "BP's internal standards and procedures were defective and did not prevent violations."[605] The ID concluded that "[w]hile BP took steps to identify manipulative trading through its reports, [certain] reports ***could have been improved by***

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602 BOE at 88-92.

603 Policy Statement on Compliance at 8.

604 ID at P 241.

605 *Id.* at P 243.

including additional data."[606] However, the Commission has never articulated a standard that would support finding a compliance program defective because certain reports "could have been improved." The finding that BP's program "did not prevent" the violation is also contrary to the Commission's assurance that "[t]he failure to prevent or detect the instant violation does not necessarily mean that the program is not generally effective in preventing and detecting violations."[607] The Commission has also stated that "even when strong compliance measures are taken, violations may still occur. . ."[608]

This finding also ignored substantial record evidence that BP Compliance had access to numerous other sources of information including weekly meetings with the trading managers on topics such as positions and profit and loss.[609]

Opinion No. 549 also erred in concurring with the ID's disregard of numerous compliance reports produced during the IP and focused instead on an October 21, 2008 trader anomaly report finding that there was no evidence that BP investigated this particular report.[610] However, there is no record evidence that BP had a company requirement to investigate each time a daily report flagged a specific trade. As Simmons testified and the ID acknowledged, BP Compliance would "dig deeper," which included talking to the traders, and following up when Compliance determined further inquiry was needed.[611] The ID even conceded that "Simmons testified that follow ups occurred when

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606 *Id.* at P 242 (emphasis added).

607 Penalty Guidelines at § 1B2.1(a).

608 Policy Statement on Compliance at 2.

609 Ex. BP-001 at 14:22-15:2.

610 ID at P 243.

611 Tr. at 2113:18-2113:25.

BP Compliance determined it was necessary …"[612] Opinion No. 549's failure to address this and simply affirm the ID's conclusion was error.

b. Factor 2: High Level Management Knowledge and Oversight of Internal Compliance Programs

Although the ID acknowledged that "BP had a hierarchy of high-level officials reporting directly to other high-level officials" and that it hired an Independent Monitor, the ID concluded that BP "did not effectively have high-level management oversight of internal compliance" and that "the record in this case indicates a total lack of oversight."[613] The ID based its conclusions solely on the fact that it decided Calvin Schlenker and Parker, neither of whom were in BP Compliance, had an improper conversation,[614] Simmons made a bad joke, and Michael Berry left the company.[615] However, these three examples lack any connection to Factor 2 and further reflect the ID's lack of reasoned decisionmaking. Opinion No. 549 erred in affirming this conclusion.[616]

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

There was also no evidentiary support for the ID's conclusion, which Opinion No. 549 wrongly affirmed, that BP "failed to make reasonable efforts to screen out 'bad actors.'"[617] The ID acknowledged the record evidence demonstrating that BP implemented and maintained measures to detect violations in its compliance program, but

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612 ID at P 243.

613 ID at P 248.

614 There was nothing "improper" about Schlenker and Parker discussing the issue at that time.

615 ID at P 248.

616 Opinion No. 549 at P 402.

617 ID at P 249; Opinion No. 549 at P 402.

found without support that "these actions could not effectively screen out a 'bad actor' as no evidence suggested there was a follow up to Comfort's flagged October 21, 2008 trading."[618]

d. Factor 4: Reasonable Communication and Training Efforts

The ID further erred in concluding that BP's communication and training efforts were deficient.[619] Though the ID acknowledged that "BP compliance frequently attended manager meetings," it decided that, because BP Compliance "made observations and asked questions," they "were passive attendees [and] were not engaged participants in the meetings."[620] This finding is contrary to the record evidence and Opinion No. 549 erred in affirming it.[621]

In addition, the ID mistakenly determined that "[t]he record evidence in this case shows that the Texas team traders received limited anti-manipulation training; therefore it is found that BP's training efforts were deficient."[622] The ID based this finding solely on the fact that trading slides included in Exhibit OE-047 did not expressly address "physical-for-financial manipulation."[623] However, the ID overlooked the fact that the slides contained several references to manipulation, including "[a]s a general rule, you

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618 *Id.*

619 ID at P 250.

620 *Id.*

621 In fact, Mr. Tom Nuelle testified: BP compliance personnel participated in weekly meetings with the trading managers. In addition, representatives from product control, market risk and legal would participate. At those meetings front office personnel would discuss their previous week's profit and loss, their major positions, as well as market fundamentals that were used for decision-making purposes regarding their positions. Compliance personnel attended these meetings to listen to the discussion, monitor the previous week's positions, and ask any questions that compliance personnel may have. Ex. BP-001 at 14:22-15:2.

622 ID at P 251.

623 *Id.*

are expected to sell to the best bid and buy from the best offer," and "[a]ny transaction conducted outside the market price is likely to be viewed with suspicion by a regulator."[624] Moreover, this finding erred in ignoring Luskie's hearing testimony that his understanding of market manipulation was based not only on discussions with other team members, but with BP compliance officers. He testified that the team "had conversations with … compliance officers on a semi-regular basis" and that he thought "there was always a line of communication there that [the Texas Team] would speak with them about scenarios, and they would come into our trader meetings at times."[625] Moreover, the ID's conclusion also ignored the record evidence that Luskie, Comfort, and Barnhart could identify situations potentially involving "physical-for financial manipulation" by other market participants.[626]

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

There is no evidentiary support for the ID's finding that the evidence "suggests that the culture was not conducive to employees reporting compliance violations."[627] In fact, this is contrary to substantial record evidence, including the fact that Barnhart and another trader previously reported a line manager for a violation.[628] BP had a confidential "Helpline" and required its employees to report possible violations. The ID even acknowledged that "[t]he evidence shows that there were avenues for employees to

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624 Ex. OE-047 at 24.

625 Tr. at 365:10-366:11.

626 BOE at 97. The record evidence shows that on Oct 31, 2008 the Texas Texam did in fact identify what they regarded as a potential physical-for-financial manipulation by a third party.

627 ID at P 253.

628 Tr. at 1056:10-1057:5.

report."[629] Yet, without record or legal authority, the ID concluded that "this is not enough to meet the Commission requirements for this factor."[630]

The sole basis cited in the ID was that, following his conversation with Parker, Luskie first called Comfort instead of BP Compliance.[631] Luskie's decision to first call Comfort is completely irrelevant to whether BP satisfied the factor's objective standard. Further, the ID erred in assuming that Luskie believed that noncompliance had occurred when he did not. Finally, this finding ignored the fact that Luskie promptly reported the matter to the Independent Monitor.

f. Factor 6: Compliance Incentives and Noncompliance Sanctions

There is no record support or legal precedent for the ID's finding that BP's bonus structure reflected a lack of compliance incentives and noncompliance sanctions.[632] First of all, to BP's knowledge, no Commission precedent has ever concluded that a market participant's bonus structure established a lack of compliance. Further, the ID erroneously concluded that BP's bonus structure compensated traders with a percentage of their individual profit and loss.[633] The ID also ignored the fact that BP's Passport to Work program incentivized BP employees to successfully complete certain training programs to maintain their jobs.[634] Instead, the ID concluded without any support that "[b]ecause financial traders generally receive a higher percentage of the value they generate, Comfort had incentive to make more money on his financial than physical

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629 ID at P 254.

630 *Id.*

631 *Id*.

632 ID at P 255.

633 *Id.* at P 227.

634 Ex. BP-001 at 12:4-12:6; Tr. at 725:24-726:5.

book."[635] Opinion No. 549 erred in ignoring all of the record evidence and affirming this finding.

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

The ID wrongly found, and Opinion No. 549 implicitly agreed, that BP failed to take reasonable steps following the November 5, 2008 phone call. The ID conceded that, on the same day that the call took place, on November 5, 2008, "BP notified the Independent Monitor of the call."[636] However, the ID found without reason or explanation that these steps were "minimal actions conducive to complying with [BP's] own protocols."[637] The ID mistakenly placed significant emphasis on the fact that various drafts of the investigative report deleted and added information.[638] In doing so, the ID disregarded Nuelle's testimony that with multiple drafts, "[t]hings get added; things get deleted [and] [s]ometimes things are deleted by mistake."[639]

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[635] ID at P 255 (internal quotations omitted). To the contrary, Comfort testified that from his perspective, at the time, "money generated is money generated" and it made no difference whether the trades were physical or financial. Tr. at 1161:11-1161:23.

[636] ID at P 259.

[637] *Id.* at P 260.

[638] *Id.* at PP 260-62.

[639] Tr. At 2450:5-2450:10. Following the enactment of EPAct 2005, the Commission explained that it assesses a company's cooperation (or lack thereof) by considering the following examples: "failing to respond to data requests in a timely manner; failing to produce documents and witnesses within a reasonable period; misrepresenting the nature or extent of the misconduct; claiming that records are unavailable when they are; limiting staff access to employees; inappropriately directing or influencing employees or their counsel not to cooperate fully or openly with the investigation; engaging in obstructive conduct during investigative testimony or interviews; providing specious explanations for instances of misconduct that are uncovered; failing properly to search computer hard drives for documents and electronic images; and failing to provide documents in the way they are maintained in the normal course of business." *Enforcement of Statutes, Orders, Rules and Regulations*, Policy Statement on Enforcement, 113 FERC ¶ 61,068 (Oct. 20, 2005). These examples starkly contrast the significant, proactive measures that BP undertook to fully cooperate with the Commission.

In addition, the ID ignored record evidence and mistakenly determined that "BP unreasonably (and inexplicably) ended its internal inquiry into the November 5 call before it was completed."[640] In fact, BP directed its efforts following the November call to responding to the flood of data requests that it received from FERC and the CFTC.[641] Finally, the ID erred in concluding that BP lacked an "adequate reason" to conclude its internal inquiry despite the initiation of the federal investigations. The ID failed to point to any Commission rule, regulation, or order mandating that, in the face of two federal investigations, a market participant must simultaneously proceed with an internal investigation.

I. The Assessment of Civil Penalties is Contrary to Law and Unsupported by Record Evidence.

Opinion No. 549 erred in assessing a civil penalty of $20.16 million against BP.[642] Opinion No. 549 also erred in justifying this improper figure by asserting without factual or legal support that it could have imposed a penalty "far higher" than $20.16 million because BP engaged in "well over 600 violations and perhaps more than 900."[643] In addition, Opinion No. 549 incorrectly decided on a penalty amount "at the top of the Guidelines range" due to the alleged seriousness of the violations.[644]

Opinion No. 549 erred in suggesting that the total number of violations at issue was somewhere between over 600 and "perhaps" more than 900. The "over 600" number assumes that every fixed price trade made at HSC during the IP was manipulative, even

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640 ID at P 263.

641 Ex. BP-001 at 17:21-18:17; 22:16-22:21; Tr. at 2297:5-2297:21.

642 Opinion No. 549 at P 410.

643 *Id.* at P 404.

644 *Id.* at P 410.

though no showing has been made to support that contention. (Opinion No. 549 maintained that it is not necessary to do so, which is, BP respectfully submits, another plain error). Review of the record evidence upon which Opinion No. 549 relied shows that the additional transactions identified by Abrantes-Metz are a subset of the total number of fixed price sales (680) and are not additive.[645] Moreover, the suggestion that the Commission could impose a civil penalty of $716 million in this case cannot be reconciled with the statute. A penalty equal to 371 times the maximum estimated (intrastate) market harm and equal to 3,456 times the alleged unjust profit would not take into account "the nature and seriousness of the violation." Opinion No. 549 also erred in computing the amount of the civil penalty because it did not limit that penalty to wholesale market transactions or impacts and due to numerous methodological and legal errors. Moreover, no basis exists upon which to contend that the civil penalty must be at the maximum range because of the alleged impact on wholesale natural gas markets subject to the jurisdiction of the Commission where, as here, no such impact was alleged, proved, or quantified in any meaningful detail.

J. Commission Procedures Regarding Separation of Functions Violate the APA.

In violation of Section 554(d)(2) of the APA, the Commission's separation of functions rule permits its investigators and prosecutors to participate and advise in the decision and agency review of the same conduct that they investigated.[646] The rule

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[645] Ex. OE-129 at 150, Table 18.

[646] 18 C.F.R. §§ 2201 and 2202 (2016). The Commission acknowledges that the NGA section 22 penalty provisions are within the ambit of Section 554(d). *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 78 (2007) ("Therefore, NGA section 22 civil penalty provisions fall within APA section 554(d). APA section 554(d)(2) requires agencies to separate the functions of 'investigating or prosecuting' from the function of adjudicating.").

achieves this unlawful purpose by fabricating an arbitrary point at which the requirements of 554(d)(2) begin to apply. The Commission's separation of functions rule provides as follows:

> In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter ***beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter***, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.[647]

The Commission "initiates a proceeding governed by part 385" by issuing an order to show cause pursuant to Rule 209(a)(2).[648] That is what the Commission did in BP's case on August 5, 2013, ***after investigating BP for nearly five years***.[649] The Commission, through its rules, asserts that those five years of investigation do not count—that the APA permits an investigator who spent a large portion of her career investigating BP to bow out before the Commission-defined "proceeding" technically begins, then to participate in the decision of BP's liability.

That is precisely what the plain terms and intent of Section 554(d)(2) prohibit:

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[647] 18 C.F.R. § 385.2202 (2016) (emphasis added).

[648] *Id.;* 18 C.F.R. § 385.209 (2016).

[649] 144 FERC ¶ 61,100 at P 1 (2013), stating that:

> "Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure, the Commission's Revised Policy Statement on Enforcement, and the Commission's Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, the Commission directs the above-captioned companies to show cause why they should not be found to have violated section 1c.1 of the Commission's regulations and section 4A of the Natural Gas Act."

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.[650]

The law is simple and sensible. It has no artificial temporal limitations. It has no technicalities based upon defined terms. If you investigate a party, you cannot participate in the decision of that party's liability.

In adopting the rule, Congress recognized that where the APA combines in single agencies investigatory, adjudicatory, and agency review functions, reasonable separation of functions is necessary. The Ninth Circuit quoted the legislative history in which Congress explained its intent to avoid the two principle ills that would attend the combination of these functions. First, "'investigators, if allowed to participate (in adjudication), would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal.'"[651] Second, "'[a] man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.'"[652] Rather than comply with the requirements of 554(d)(2) and Congressional intent, the Commission's rule is designed to defeat the APA's separation of functions requirement.

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650 5 U.S.C. § 554(d)(2).

651 *Grolier Inc. v. FTC*, 615 F.2d 1215, 1219-21 (9th Cir. 1980) (citing Report of the Attorney General's Committee on Administrative Procedure 50 (1941), S.Doc. No. 8, 77th Cong., 1st Sess. 50 (1941)) (emphasis added) (holding that an individual who formerly served as an agency attorney-advisor is prohibited from later participating in the adjudication of a case involving a defendant that was charged and investigated by the agency during the time he served as attorney-advisor "if he was sufficiently involved with the case to be apprised of ex parte information").

652 *Id.* at 1219.

Besides contradicting the plain terms of the APA, the Commission's form-over-substance approach to separation of functions is inconsistent with numerous United States Courts of Appeals' treatment of 554(d)(2). The D.C. Circuit, Ninth Circuit, Third Circuit, and Second Circuit unanimously elevate substance over form when applying 554(d)(2). For example, the D.C. Circuit stated that it was

> unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings, and ultimately pass upon the amenability of the respondents to the administrative orders of the commission or agency.[653]

The Ninth Circuit explained its elevation of substance over form in an opinion where it found that an agency violated section 554(d)(2):

> Despite the statutory language that an employee is precluded from participating in the adjudication of a case only when he is "engaged" in the investigation or prosecution of that case, ***Congress did not intend to limit the separation of functions to those persons contemporaneously performing both. Such a reading would permit an agency employee to become immersed in the investigation of a case, resign from the investigative position, and then be appointed judge to render the decision.*** Such was not the intention of Congress.[654]

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[653] *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266-67 (D.C. Cir. 1962). Although the D.C. Circuit was there discussing an investigator who later became a Commissioner, its reasoning did not turn on the position held because section 554(d)(2) prohibits any investigator or prosecutor from participating or advising in the decision of a case she investigated.

[654] *Grolier*, 615 F.2d at 1218, n.2 (emphasis added) (citing S.Rep. No. 572, 79th Cong., 1st Sess. 18 (1945), *reprinted in* Administrative Procedure Act Legislative History, 79th Congress 1944-46, at 204 (1946); H.R.Rep. No. 1980, 79th Cong., 1st Sess. 27 (1946); *reprinted in* Administrative Procedure Act Legislative History, 79th Congress 1944-46, at 262 (1946)). Again, although the language here involves a judge, that was not central to the court's reasoning because section 554(d)(2) prohibits any investigator or prosecutor from participating or advising in the decision of a case she investigated.

The cases applying 554(d)(2) also recognize the pressures on agency staff to satisfy the desires of their colleagues and superiors—again, a practical recognition that staff members are understandably susceptible to a "you scratch my back, I'll scratch yours" mentality. The Second Circuit explained:

> The defendant's affidavit seeks to show compliance with this requirement in the language just quoted above from the affidavit of the Deputy General Counsel; but we are not satisfied that it is enough that the Assistant General Counsel, on whom § 201.4 of the Regulations imposes the duty of preparing complaints, has in fact no part in the final decision of the General Counsel himself. ***It would be plainly contrary to the purpose of the section, if the General Counsel prepared the complaint and the Assistant Counsel made the final decision; for the subordinate would then be passing upon the success of what his superior had undertaken. True, the reverse,*** which is the actual situation, does not present so obvious a fusion of prosecutor and judge; nevertheless, ***when the subordinate is prosecutor and his superior is judge, it appears to us reasonable to suppose that the prosecutor will be disposed to select such cases as he believes will meet with his superior's approval, and that his discretion may be exercised otherwise than if each was responsible to the Postmaster only by a separate chain of authority.*** It is of course true that under any possible system of administration in the end there will be the fusion of prosecutor and judge, subject only to the supervision of the courts; but it makes much difference whether it be reserved to the highest level of authority: i.e., to the "agency" itself and it is fairly obvious that Congress had just this in mind when at the end of § 1004(c) it provided that the subsection should not apply to the "agency" or to any of its "members." There alone was the fusion to be permissible.[655]

The Third Circuit expresses an equally cautionary note:

> Thus, although technically the decision to initiate formal revocation or suspension proceedings was made by the Commissioner of Customs, that decision was made as a result of an investigation initiated and reviewed by the District Director and after consideration of his recommendations. This investigating officer presided at the hearing and recommended a decision. And

[655] *Columbia Research Corp. v. Schaffer*, 256 F.2d 677, 679 (2d Cir. 1958) (emphasis added).

> although technically the decision was made by an Assistant Secretary, it was made on the agency record compiled by the District Director and in the light of his recommended decision. Plainly, then, if Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d) applies to customhouse broker's license revocation proceedings, it was violated.[656]

Rule 2202 is inconsistent with these precedents. It would also violate fundamental notions of fairness to permit OE staffers to serve in an adjudicatory role to establish legal precedent and policies to further their own investigation or prosecution of manipulation claims.

Congress did not define "investigation" in section 554(d)(2). The Commission's regulations do. And under those regulations, investigations begin long before a "proceeding" begins.[657] In fact, the Commission's rules describe the "procedure ***after*** [an] investigation" as permitting the Commission to, "where it appears there has been or may have been a violation[,] . . . institute administrative proceedings."[658] This refers to the same "proceeding" as Rule 2202, which begins, as it did in BP's case, with the Commission's issuance of an order to show cause.[659]

In BP's case, the Commission indicated through its Notices of Designation of Commission Staff as Non-Decisional that OE investigators were designated and un-designated as decisional.

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[656] *Twigger v. Schultz*, 484 F.2d 856, 858-59 (3d Cir. 1973).

[657] 18 C.F.R. § 1b.4 (2016) (explaining that "investigations may be formal or preliminary, and public or private."); *see* 18 C.F.R. § 385.2202 (2016).

[658] *Id.* at § 1b.7 (emphasis added).

[659] *BP America Inc.,* Order To Show Cause and Notice of Proposed Penalty, 144 FERC ¶ 61,100 (2013).

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The table below reflects the Commission's decisional designations in BP's case, with red shading identifying a change:[660]

August 5, 2013	August 15, 2013	September 25, 2013	February 19, 2015	June 25, 2015
Larry Gasteiger	Larry Gasteiger	Larry Gasteiger	Larry Gasteiger	
James Owens	James Owens	James Owens	James Owens	James Owens
Justin Shellaway	Justin Shellaway	Justin Shellaway	Justin Shellaway	
Timothy Helwick	Timothy Helwick	Timothy Helwick	Timothy Helwick	Timothy Helwick
Michelle Thomas	Michelle Thomas	Eric Ciccoretti	Eric Ciccoretti	Grace Kwon
Thomas Pinkston	Elitza Voeva-Kolev	Elitza Voeva-Kolev	Shawn Bennett	Shawn Bennett
Jill Davis	Jill Davis	Jill Davis	Jill Davis	Jill Davis
Brett Rudder	Brett Rudder	Brett Rudder	Sebastian Krynski	Sebastian Krynski

It is significant that after February 19, 2015, Larry Gasteiger was dropped from decisional status. Larry Gasteiger is the current Chief of Staff to Chairman Norman C. Bay. He previously served as the Acting Director of the Office of Enforcement from August 2014 to April 2015. Prior to that he was from 2009 to 2014 the Deputy Director of the Office of Enforcement. It is not clear whether the notification of his decisional status was removed because he left the Office of Enforcement for the Chairman's Office or because a determination was made that he would be designated as non-decisional (and therefore not participate in deciding BP's liability). Another enforcement staffer who participated in the proceeding against BP and is listed on OE's briefs, Geof Hobday, also left enforcement staff to join Chairman Bay as the Chairman's advisor. As Mr. Hobday directly participated in the investigation, even under the Commission's deficient Rule

[660] *See* Notice of Designation of Commission Staff as Non-Decisional, Docket No. IN13-15-000 (Aug. 5, 2013); Notice of Designation of Commission Staff as Non-Decisional, Docket No. IN13-15-000 (Aug. 15, 2013); Notice of Designation of Commission Staff as Non-Decisional, Docket No. IN13-15-000 (Sep. 25, 2013); Notice of Designation of Commission Staff as Non-Decisional, Docket No. IN13-15-000 (Feb. 19, 2015); Notice of Designation of Commission Staff as Non-Decisional, Docket No. IN13-15-000 (June 25, 2015).

2202, he would be excluded from any decisional role and BP assumes he personally has been.

Moreover, BP sought and was wrongfully denied by the Commission information sufficient to determine whether the Commission's investigators from the period before the Order to Show Cause participated in or advised the Commission's decision with respect to Opinion No. 549 in violation of section 554(d)(2). Consistent with the Commission's ordinary practice and rules, BP sought to compel OE to prepare a privilege log.[661] The ALJ denied this request, BP filed an interlocutory appeal to the Commission, and the Commission affirmed.[662] BP has been wrongfully denied the privilege log that would allow it to ascertain the participants to these communications and to verify the Commission's compliance with 554(d)(2).

Finally, BP understands that some current Enforcement staff members have addressed publicly their view of the requirements of 554(d)(2) in a law review article defending the Commission's enforcement process.[663] Among the issues addressed, the article incorrectly argued that the Commission's rules are APA compliant because

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[661] 18 C.F.R. § 385.410(b) (2016).

[662] *BP America Inc.*, Docket No. IN13-15-000 (Aug. 14, 2014); *BP America Inc.*, Docket No. IN13-15-000 (July 31, 2014); *BP America Inc.*, Docket No. IN13-15-000 (July 3, 2014).

[663] *See Allison Murphy*, *The FERC Enforcement Process*, 35 Energy L.J. 283 (2014). The article contains a disclaimer at footnote one that the views expressed do not necessarily represent the views of the Commission, the Chairman or any individual Commissioner.

554(d)(2) applies only "after commencement of a formal adjudication."[664] To support this proposition, the article cited exclusively to cases that do not support the assertion.

The article begins its defense of the Commission's procedures with dicta from an inapposite case, *Porter County v. Izaak*.[665] The *Porter County* court mentioned in unexplained dicta that section 554(d) "applies only to formal adjudications," citing *Hercules v. EPA*.[666] Unlike the proceedings here, *Hercules* and *Porter County* addressed whether 554(d)(2) applies to *agency rulemakings* and reached the unremarkable conclusion that it does not.[667] In this adjudication, the proceedings occurred pursuant to section 557 of the APA. The plain terms of 554(d)(2) apply to prohibit an investigator from later "participate[ing] or advis[ing] in the decision, recommended decision, or agency review pursuant to section 557 of this title . . . ."[668]

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[664] *Id*. at 300. In addition to its incorrect primary arguments, Staff asserts without explanation or citation in a footnote of its article that "a FERC adjudication after an Order to Show Cause does not fall under the Administrative Procedure Act's definition of an adjudication, *i.e.*, a 'hearing on the record.'" *Id*. at n.86. This assertion is unfounded and incorrect. The plain text of the APA, which defines "adjudication" as an "agency process for the formulation of an order," does not exclude FERC adjudications following an Order to Show Cause, nor does any other applicable law. 5 U.S.C. § 551(7). The assertion also contradicts prior Commission precedent that "NGA section 22 civil penalty provisions fall within APA section 554(d). APA section 554(d)(2) requires agencies to separate the functions of 'investigating or prosecuting' from the function of adjudicating." *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 78 (2007). In fact, Staff's assertion even contradicts the Commission's own website, which charts the "Process for NGA Penalty Assessments," explaining that the "ALJ Hearing" is a "5 U.S.C. § 554 hearing." Process for NGA Penalty Assessment, FERC.gov (last accessed Aug. 3, 2016), *available at* http://ferc.gov/resources/processes/enforcement/nga.asp.

[665] *Porter Cnty Ch. of Izaak Walton League of Am., Inc. v. NRC*, 606 F.2d 1363, 1370 (D.C. Cir. 1979).

[666] *Id.*; *Hercules, Inc. v. EPA*, 598 F.2d 91, 117 (1978).

[667] The title of section 554 is "Adjudications."

[668] 5 U.S.C. § 554(d)(2). Staff's citation to *Genuine Parts* is also inapposite. *See Allison Murphy*, *The FERC Enforcement Process*, 35 ENERGY L.J. 283, 298-99, N.87 (2014) (citing *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1387 (5th Cir. 1971)). The *Genuine Parts* court explained that "an investigation discovers and produces evidence; an adjudication tests such evidence upon a record in an adversary proceeding before an independent hearing examiner to determine whether it sustains whatever charges are based upon it." 445 F.2d at 1388. The issue in that case, whether and when a line exists for due processes purposes between an "investigation" and an "adjudication" is irrelevant to BP's contention that Commission Rule 2202 violates the plain language of the APA.

The article's citation to *Air Products & Chemicals v. FERC* is slightly more analogous since it actually involved proceedings before an ALJ, but the case is equally inapposite.[669] *Air Products* considered whether an *ex parte* communication by OE to the Commission, which recommended that the Commission proceed in an investigation that the petitioners alleged was factually related to another pending proceeding before the Commission, was improper.[670] The court reviewed the communications between OE and the Commission *in camera* and determined that "[n]o recommendation or comment was made with respect to the applications now under review," so there was no participation in a decision that would violate 554(d)(2).[671] Here, unlike the fact-specific *ex parte* communication issue in *Air Products*, BP argues that the Commission's rules and procedures themselves violate section 554(d)(2) because they do not prohibit those who investigated BP from 2008 through August 5, 2013 from participating or advising in the Commission's Opinion No. 549 or any order on rehearing. *Air Products* does not speak to that issue.

The article also asserted that *Withrow v. Larkin* is relevant to section 554(d)(2), again resorting to dicta.[672] *Withrow v. Larkin* did not hold anything about the APA because the APA was not at issue before the court in that case. Further, *Larkin's* dicta about the APA is unremarkable and does not address the issue raised by BP. *Larkin* mentioned in dicta that:

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669 650 F.2d 687, 708-09 (5th Cir. 1981).

670 *Id.* at 709.

671 *Id.*

672 421 U.S. 35, 55 (1975).

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around.[673]

The cases that the article cited do not support the proposition that the Commission may lawfully permit investigators involved in a pre-proceeding investigation to participate in Opinion No. 549. No case permits this; and no case that BP has identified directly addresses the issue. The cases BP cites strongly support a plain language reading of the statute, which prohibits those employees who investigated BP from participating in deciding BP's liability:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.[674]

The Commission's failure to prohibit invested investigators from participating in Opinion No. 549 violates this law.

For these reasons, the procedures utilized to impose civil penalties against BP constitute an unlawful violation of the APA and the order issued pursuant to them must be reversed or vacated. There is no reasoned basis that the Commission could provide to justify Rule 2202, which is inconsistent with the plain language of the APA and the cases applying the statute.

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673 *Id.* at 56-57.

674 5 U.S.C. § 554(d)(2).

K. Request for Clarification or Reconsideration of Ordering Paragraphs (B) and (C) Relating to Payment Directives.

Ordering Paragraph (B) of Opinion No. 549 provides in pertinent part:

> The Commission directs BP to pay to the United States Treasury by a wire transfer the sum of $20,160,000 in civil penalties within 60 days after the issuance of this order, as discussed in the body of this order. If BP does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19(a)(2015) from the date that payment is due.

Ordering Paragraph (C) provides:

> The Commission directs BP, within 60 days after the issuance of this order to disgorge its unjust profits in the amount of $207,169 to the Low Income Home Energy Assistance Program (LIHEAP) of the state of Texas for the benefit of its energy consumers.

As noted above, BP has sought rehearing of every material element of the Opinion No. 549. BP also will file a timely petition for review of the portion of Opinion No. 549 rejecting BP's request for rehearing of the Commission's prior order denying BP's motion to dismiss.

BP seeks clarification or reconsideration of the Commission's payment directives. Ordering Paragraph (B) states that BP may not pay the civil penalty within the 60 days specified, but that interest will accrue from the date of payment forward pursuant to Commission regulations while the Commission considers BP's request for rehearing and while a reviewing court considers BP's further appeal, if necessary. If that is in fact the intent of Ordering Paragraph (B), BP does not object.

However, if the intent of Ordering Paragraph (B) contemplates a payment prior to the date on which Opinion No. 549 becomes final and non-appealable, BP seeks clarification or reconsideration.

If the Commission on rehearing or a reviewing court determines that BP's objections are valid, wholly or in part, those objections may reduce or eliminate the civil penalty. Mandating payment prior to that ultimate determination and requiring BP to seek recoupment from the United States Treasury would introduce needless delay, complexity, and uncertainty.

Should the Commission desire additional assurance of payment, BP is willing and able to post a bond in the full amount of the civil penalty assessed (under protest). Interest would continue to accrue on the amounts due under Commission regulation during the pendency of further review proceedings.

Unlike Ordering Paragraph (B), Ordering Paragraph (C) mandates the payment of the challenged disgorgement amounts to LIHEAP within sixty days. BP has challenged all aspects of the disgorgement amount. Moreover, and noting that BP specifically contests that any disgorgement amount is in fact due, BP has no objection to making a payment of any disgorgement amount ultimately found to be due to LIHEAP, following Commission action on rehearing and on judicial review. LIHEAP, however, is not subject to the jurisdiction of the Commission and substantial doubt exists that the Commission as a result could direct LIHEAP to return any disgorgement amounts ultimately disallowed by either the Commission on rehearing or by a reviewing court. Here again, to provide assurance of payment, BP is both willing and able to post a bond (under protest) during the pendency of review proceedings in the full amount of the disgorgement amount. BP has no objection to providing additional interest on the disgorgement amounts during the pendency of the review proceedings, pursuant to Commission regulations.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, BP respectfully requests that the Commission grant this request for rehearing, reverse or vacate Opinion No. 549 and terminate this proceeding. BP also seeks clarification or reconsideration of the payment provisions of Opinion No. 549, as noted above.

Respectfully submitted,

/s/ Mark R. Haskell

Timothy L. Moorehead
Managing Counsel
BP Legal Global Litigation
BP America Inc.
501 Westlake Park Boulevard
Houston, TX 77079
(832) 664-2882
timothy.moorehead@bp.com

Betsy Carr
Sr. Counsel – IST Legal
BP America Inc.
201 Helios Way
Houston, TX 77079
(713) 323-6353
betsy.carr@bp.com

Mark R. Haskell
George D. Billinson
Brett A. Snyder
Thomas R. Millar
Mary K. Treanor*
Cadwalader, Wickersham & Taft LLP
700 Sixth Street NW
Washington, DC 20001
(202) 862-2200
mark.haskell@cwt.com
george.billinson@cwt.com
brett.snyder@cwt.com
tom.millar@cwt.com
mary.treanor@cwt.com

*Admitted in New York only

Dated: August 10, 2016

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 10th day of August, 2016.

/s/ Thomas R. Millar

Thomas R. Millar
Cadwalader, Wickersham & Taft LLP
700 Sixth Street NW
Washington, DC 20001
(202) 862-2200
tom.millar@cwt.com

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