

NGPA DEFINITION OF “FIRST SALES”: RENEWED SIGNIFICANCE IN VIEW OF FERC’S EXPANDED ENFORCEMENT POWERS

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Synopsis: The scope of the NGPA “first sale” definition took on new significance in light of enactment of NGA sections 4A (authorizing the Federal Energy Regulatory Commission [hereinafter “FERC” or “the Commission”] to prohibit “market manipulation”) and 23 (authorizing civil penalties of up to \$1 million/violation/day). Interstate sales-for-resale made under blanket sales certificate authority are subject to the Commission’s market-manipulation rules. Natural-gas companies engaged in such sales may be subject to potentially millions of dollars in civil penalties if their sales violate FERC’s market-manipulation rules (or are deemed manipulative by FERC’s Office of Enforcement).

By contrast, interstate sales-for-resale that are NGPA first sales may be held exempt from the Commission’s NGA authority, including FERC’s market-manipulation rules. Significantly, if such sales are exempt, entities making such sales would not be potentially subject to civil penalties even if the seller’s conduct is inconsistent with FERC’s market-manipulation rules. Thus, exposure to potential civil penalties may turn on whether particular sales are made under NGA blanket certificate authority or qualify as NGPA first sales exempt from regulation under the NGA.

This article examines the extent to which FERC Order No. 644 narrows the NGPA first sale definition and whether that construction contravenes the language and structure of the NGPA, and the legislative history and purpose of the Act. It is noteworthy that FERC’s interpretation is neither codified as a regulation, nor has it been subject to judicial review.

The issues addressed in this article are important to natural gas marketers and integrated natural gas producers whose exposure to civil penalties may turn on application of the first sale definition. Accordingly, the article identifies strategies potentially affected gas marketers and integrated producers may implement to reduce potential exposure to civil penalties.

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I. INTRODUCTION

Wellhead natural gas deregulation under the Natural Gas Policy Act of 1978 (“NGPA”)¹, as amended by the Natural Gas Wellhead Decontrol Act of 1989 (“Decontrol Act”)², combined with restructuring of the interstate natural gas pipeline industry by the Federal Energy Regulatory Commission (“Commission” or “FERC”) under FERC Order No. 636,³ fundamentally changed the manner in

1. Pub. L. 95-621, 92 Stat. 3350, 15 U.S.C. §§ 3301, *et seq.* (2012) [hereinafter NGPA].

2. Pub. L. 101-60, § 3(b)(7), 103 Stat. 157, 159, amending 15 U.S.C. § 3431 (2012) [hereinafter Decontrol Act].

3. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission’s Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC STATS. & REGS. ¶ 30,939 (1992) [hereinafter Order No. 636], III F.E.R.C. STATS. & REGS. ¶ 30,939 (Apr. 8, 1992), *reh’g granted and denied in part*; Order No. 636-A, III F.E.R.C. STATS. & REGS. ¶ 30,950 (Aug. 3, 1992), *order on reh’g*; Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (Nov. 27, 1992) (codified at 18 C.F.R. pt. 284), *reh’g denied*; 62 F.E.R.C. ¶ 61,007 (1993), *aff’d in part and remanded in part*; *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

which natural gas is marketed and sold. Following the deregulatory lead of Congress in the NGPA, FERC adopted regulatory initiatives under the Natural Gas Act (“NGA”)⁴ that all but eliminated regulatory distinctions between statutorily deregulated NGPA “first sales” and “jurisdictional” sales subject to continued regulation under the NGA.⁵

The producing sector responded, delivering increasingly abundant supplies of domestically produced natural gas to expanding markets.⁶ Marketers flourished in the unregulated resale market that developed following deregulation and industry restructuring.⁷ Consumers also benefitted from the increased availability of competitively priced supplies of natural gas and the competition that followed the growth of an independent gas marketer segment.⁸

Two subsequent legislative developments affect the laissez-faire environment in which producer sales and gas marketers have flourished, creating substantial new regulatory risks for producers, independent gas marketers and other sellers of natural gas. One such development was the enactment of section 315 of the Energy Policy Act of 2005 (“EPAAct 2005”)⁹ amending the NGA by adding a new section 4A authorizing FERC to prohibit “market manipulation.”¹⁰ The other was the contemporaneous enactment of section 314 of EPAAct 2005¹¹ amending the NGA to authorize civil penalties of up to \$1 million dollars per violation per day.¹² Those substantial civil penalties may be assessed by FERC for violation of its market-manipulation rules promulgated under NGA section 4A.¹³

In an Article published in the Energy Law Journal in December 2010, the author argued that the jurisdictional limits set forth in section 1(b) of the NGA constrain the exercise by FERC of the power to prohibit “market manipulation” under NGA section 4A.¹⁴ Thus, *NGA Jurisdictional Limits* argued that despite section 4A’s purported authorization of FERC to prohibit market manipulation by “any entity,” FERC’s regulatory prohibition against market manipulation is limited to persons engaged in NGA-jurisdictional activities, i.e., “natural-gas companies.”¹⁵ In an analogous context, the decision of the United States Court of Appeals for the Fifth Circuit in *Texas Pipeline Ass’n v. FERC*¹⁶ provided strong support for that jurisdictional analysis.

4. 15 U.S.C. § 717 (2012) [hereinafter NGA].

5. *Regulations Governing Blanket Marketer Sales Certificates*, F.E.R.C. STATS. & REGS. ¶ 30,957 (1992), *order on reh’g and clarification*, 62 F.E.R.C. ¶ 61,239 (1993) [collectively, hereinafter Order No. 547], codified at 18 C.F.R. § 284.402 (2017).

6. Elisabeth Pendley, *Deregulation of the Energy Industry*, NAT. RES. LAW CTR., UNIV. OF COLO. L. SCH., pp. 2-4 (1995).

7. *Id.* at 2, 4.

8. *Id.* at 3.

9. Pub. L. No. 109-58, § 315, 119 Stat. 594, 691 [hereinafter EPAAct 2005].

10. *Id.* (codified at 15 U.S.C. § 717c-1 (2012)).

11. Pub. L. No. 109-58, §314(b), 119 Stat. 594, 690-91.

12. *Id.* § 314(b) (codified at 15 U.S.C. § 717t-1 (2012)).

13. *Id.*

14. William F. Demarest Jr., “Traditional” *NGA Jurisdictional Limits Constrain FERC’s Market Manipulation Authority*, 31 ENERGY L.J. 464, 506-08 (2010) [hereinafter *NGA Jurisdictional Limits*].

15. *Id.* at 471-72, 474, 480, 506-07.

16. *Texas Pipeline Ass’n v. FERC*, 661 F.3d 258 (5th Cir. 2011).

Whether sales of natural gas are “jurisdictional” under the NGA, or are NGPA-deregulated “first sales,” has taken on critical significance to producers, marketers, and other sellers of natural gas in light of the potential civil penalties for violating FERC’s regulations prohibiting “market manipulation.”¹⁷ For the reasons set forth in *NGA Jurisdictional Limits*, FERC’s authority to prohibit market manipulation may be limited to persons engaged in making NGA-jurisdictional sales, and may very well not reach those persons engaged exclusively in so-called “non-jurisdictional” sales, i.e., federally unregulated “intra-state” sales, direct sales to end users, and deregulated NGPA “first sales.”¹⁸ If that analysis is correct, only sales of natural gas in interstate commerce for resale (“interstate sales-for-resale”) that are not NGPA first sales, and, therefore, are made under NGA sales certificate authority, i.e., “NGA-jurisdictional sales,” remain subject to the Commission’s market-manipulation rules. By contrast, interstate sales-for-resale that are also NGPA first sales would be exempt from the Commission’s NGA authority, including FERC’s market-manipulation rules promulgated under the authority of NGA section 4A.

Regrettably, as a consequence of FERC Order No. 644,¹⁹ the line between NGPA first sales and NGA-jurisdictional sales is not as clear as one might hope. Order No. 644 greatly expanded those who are authorized to make NGA-jurisdictional sales²⁰ by issuing “blanket certificates” to all persons and companies that are not interstate natural gas pipelines or an affiliate thereof. A generally overlooked aspect of Order No. 644 is an uncodified²¹ and judicially un-reviewed interpretation of the NGPA first sale definition that, if sustained, could bring within the ambit of FERC’s enforcement and civil penalty authority a range of transactions exempt from regulation under a literal construction of the NGPA statutory language.

The distinction between NGA-regulated blanket certificate sales and deregulated NGPA first sales is irrelevant to most commercial transactions. The distinction often takes on significance only after an allegation of prohibited market manipulation is asserted. For that reason, many active participants in the natural gas marketplace may be oblivious to whether their sales are NGPA first sales or are NGA-jurisdictional sales authorized under FERC’s blanket sales certificates.

17. The Commission has sought millions of dollars in civil penalties for violation of the Commission’s regulatory prohibitions against market manipulation adopted under section 4A of the NGA. See, e.g., *Energy Transfer Partners, L.P.*, 120 F.E.R.C. ¶ 61,086 (2007) (\$82 million); *Amaranth Advisors L.L.C.*, 128 F.E.R.C. ¶ 61,154 (2009) (\$7.5 million settlement); *Nat’l Fuels Mktg.*, 126 F.E.R.C. ¶ 61,042 (2009) (\$4 million demanded); *Seminole Energy Servs. L.L.C.*, 126 F.E.R.C. ¶ 61,041 (2009) (\$3.75 million demanded); *Tenaska Mktg. Ventures*, 126 F.E.R.C. ¶ 61,040 (2009) (\$8.4 million settlement in six related matters); *BP America Inc.*, 156 F.E.R.C. ¶ 61,031 (2016) (\$20.16 million); *Total Gas & Power N. Am., Inc.*, 155 F.E.R.C. ¶ 61,105 (2016) (\$216.6 million demanded).

18. Demarest, *supra* note 14, at 471-72, 480-81.

19. *Amendments to Blanket Sales Certificates* [hereinafter Order No. 644], F.E.R.C. STATS. & REGS. ¶ 31,153 (2003), *reh’g denied*, [hereinafter Order No. 644-A] 107 F.E.R.C. ¶ 61,174 (2004).

20. Section 7(c) of the NGA requires sellers engaged in NGA-jurisdictional sales of natural gas to obtain “certificate” authorization from FERC before commencing such sales. See 15 U.S.C. § 717f(c) (2012).

21. Although discussed in the Regulatory Preamble to the rule, the interpretation is not reflected in the text codified as part of the Code of Federal Regulations.

However, when an assertion of market manipulation is made in the sales (as opposed to transportation) context,²² the validity of the untested limitations under Order No. 644 on the scope of the NGPA first sale definition may become critically important.

This Article explores the largely ignored questions relating to the scope of the NGPA definition of “first sales” raised by FERC’s judicially un-reviewed construction in Order No. 644. For the reasons set forth in *NGA Jurisdictional Limits*, the scope of the first sale definition may be outcome-determinative for market participants engaged exclusively in making first sales. Resolution of these issues is important because millions of dollars in potential civil penalty liability may turn on whether particular sales qualify as NGPA first sales rather than NGA-jurisdictional sales conducted under blanket certificate authority.

II. JURISDICTIONAL LIMITATIONS OF THE NGA

An understanding of the traditional scope of the Commission’s jurisdiction under the NGA is an essential predicate to analysis of the application of FERC’s market-manipulation and civil penalty authority to first sale transactions.

A. Overarching Jurisdictional Considerations

“As a federal agency, [the] FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.”²³ The D.C. Circuit has pointedly concluded, “if there is no statute conferring authority, [the] FERC has none.”²⁴ Thus, FERC is powerless to expand its regulatory jurisdiction beyond that delegated by Congress, even where FERC views the need for regulation as compelling.²⁵ As the United States Court of Appeals for the Fifth Circuit has observed, “Need for regulation cannot alone create authority to regulate.”²⁶

In enacting the NGA, Congress did not intend to “occupy the field” or even to delegate to the Commission the fullest extent of Congress’ constitutional power under the Commerce Clause.²⁷ Instead, Congress acted to plug a regulatory gap

22. The FERC’s prohibition against market manipulation is not limited to sales activities; it also applies to transportation of natural gas in interstate commerce under the NGA. For reasons similar to those set forth above with respect to the limitation of FERC market-manipulation authority to NGA-jurisdictional sales, FERC’s authority to prohibit manipulation respecting natural gas transportation activities is similarly limited and does not extend to transportation of natural gas in intrastate commerce, *see Texas Pipeline Ass’n*, or to interstate transportation of natural gas under section 311 of the NGPA, 15 U.S.C. § 3371 (2012), which contains its own enforcement and civil penalty authority. *See also* 15 U.S.C. §§ 3414(a) and (b) (2012).

23. *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (emphasis in original) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

24. *Id.* (citing *Michigan v. EPA*, 268 F.3d at 1081 (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that “an agency literally has no power to act . . . unless and until Congress confers power upon it”)).

25. *Id.*

26. *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 371 (5th Cir. 1997). *See Chevron USA., Inc. v. FERC*, 193 F. Supp. 2d 54, 72-73 (D.D.C. 2002) (“The fact that [FERC] finds these . . . regulations necessary does not mean that [FERC] has been granted the statutory authority to promulgate them . . .”).

27. *FPC v. E. Ohio Gas Co.*, 338 U.S. 464, 470 (1950); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 514-16 (1947) (“Three things and three only Congress drew within its own regulatory power. . . .”); *Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506-08 (1942).

(the “*Attleboro* gap”) created by prior Supreme Court decisions limiting state regulatory powers under the Commerce Clause to the U.S. Constitution.²⁸ Those decisions constrained the authority of the states to regulate certain transactions having an interstate component.²⁹ The congressional response to those cases limited the scope of the Commission’s jurisdiction to certain natural gas sales and transportation activities having an interstate component placing them beyond the reach of state regulation, and to the persons engaged in those activities, i.e., “natural-gas companies.”³⁰

B. Jurisdictional Precedents under the NGA

1. The Statutory Structure of the NGA

The structure of the NGA is distinguished by the presence of a specific jurisdictional provision, NGA section 1(b).³¹ This aspect of the NGA is a direct result of Congress’s decision to limit the scope of the Commission’s jurisdiction to plugging the *Attleboro* gap, rather than occupying the field.³² As such, section 1(b) is an essential component of the Act, defining the scope of the statute and, as such, is a defining aspect of the character of the Act differentiating it from other statutes lacking a similar provision defining, and limiting, the agency’s jurisdiction.

In this regard it may be helpful to think of the Act in two respects. The first relates to jurisdiction (or scope) and the second relates to authority (or powers). The powers conferred on FERC under the substantive provisions of the Act, e.g., sections 4, 5, and 7, have been consistently construed as constrained by the jurisdictional limits Congress placed under NGA section 1(b) upon the exercise of that power.³³ Accordingly, it is well established that the substantive authorities conferred under sections 4, 5, and 7 “do not expand the Commission’s [section] 1(b) jurisdiction.”³⁴

2. The Traditional Jurisdiction of the Commission under Section 1(b) of the NGA

Disregarding the amendments to NGA section 1(b) made by EAct 2005 as not applicable in this context, the Commission’s “traditional” NGA jurisdiction has been described as covering “[t]hree things and three only:”

28. *State Corp. Comm’n of Kan. v. Wichita Gas Co.*, 290 U.S. 561, 563 (1934); *Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927); *Mo. ex rel. Barrett v. Kan. Nat. Gas Co.*, 265 U.S. 298 (1924); U.S. CONST. art. I, § 8.

29. *Panhandle E.*, 332 U.S. at 518 n.13 (discussing NGA legislative history).

30. 15 U.S.C. § 717(b) (2012); *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-03 (1949) (“[T]he Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution”); *United Distribution Cos.*, 88 F.3d at 1122 (“The NGA was intended to fill the regulatory gap left by a series of Supreme Court decisions that interpreted the dormant Commerce Clause to preclude state regulation of interstate transportation and of [interstate] wholesale gas sales”).

31. 15 U.S.C. § 717(b) (2012).

32. EAct 2005; *see generally E. Ohio Gas Co.*, 338 U.S. 464.

33. *Shell Oil Co. v. FERC*, 566 F.2d 536, 540-41 (5th Cir. 1978).

34. *Conoco, Inc. v. FERC*, 90 F.3d 536, 553 (D.C. Cir. 1996).

- (1) “the transportation of natural gas in interstate commerce;”
- (2) the “sale in interstate commerce [of natural gas] for resale;” and
- (3) “natural gas companies engaged in such transportation or sale.”³⁵

In this regard, section 1(b) of the Act expressly excludes certain activities from the Commission’s NGA jurisdiction:

The provisions of this [Act] . . . shall not apply to any other transportation [e.g., intrastate transportation] or sale [e.g., “intrastate sales” and retail sales] of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.³⁶

Thus, in enacting section 1(b), “Congress . . . not only prescribed the intended reach of the Commission’s power, *but also specified the areas into which this power was not to extend.*”³⁷

As explained in *NGA Jurisdictional Limits*, “[w]hether, and to what extent, the[] jurisdictional limitations [of section 1(b)] are applicable to section 4A is the key to construing the meaning of the term ‘any entity’ in section 4A, which in turn bears directly on the . . . reach of the Commission’s” prohibition against market manipulation and the Commission’s ability to impose civil penalties for violations thereof.³⁸

35. See generally *Panhandle E. Pipe Line Co.*, 332 U.S. 507. The Energy Policy Act of 2005 amended NGA section 1(b) to expand the jurisdictional scope of the NGA in respects other than regulation of market manipulation. See EPAAct 2005 § 311(a) (codified as amended at 15 U.S.C. § 717(b) (2012)). Ironically, had Congress also amended NGA section 1(b) to include “entities” subject to the Commission’s newly conferred authority to prohibit market manipulation as “natural gas companies,” the issues raised in *NGA Jurisdictional Limits* and addressed in this article would be moot. For simplicity, this introductory historical discussion of the traditional scope of regulation under the NGA does not take into account the narrowing of the Commission’s NGA jurisdiction enacted in section 601 of the NGPA, as amended by the Decontrol Act, to exclude from the Commission’s NGA jurisdiction certain interstate sales of natural gas (15 U.S.C. § 3431(a)(1)(A) (2012)), and certain interstate transportation of natural gas (15 U.S.C. § 3431(a)(2) (2012)) authorized by section 311 of the NGPA (15 U.S.C. § 3371(a) (2012)). This simplification has no effect on the validity of the analysis or application of the jurisdictional conclusions to NGPA first sales or to interstate transportation of natural gas authorized under NGPA section 311. See *Panhandle E. Pipe Line Co.*, 332 U.S. at 516.

36. 15 U.S.C. § 717(b) (2012).

37. *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 503 (1949) (emphasis added).

38. This article is not intended to re-examine the analysis presented in *NGA Jurisdictional Limits*. Other questions relating to the application of NGA section 4A exist, some of which were not addressed directly in that article. For example, the question has arisen whether NGA section 4A’s reference to “any entity” includes individuals rather than merely corporate entities. *NGA Jurisdictional Limits* suggests that that issue is subsumed within the broader question of the relationship between NGA sections 4A and 1(b), and, if the individual is engaged in an activity as a “natural gas company,” i.e., in making jurisdictional sales, there is nothing in section 1(b) of the NGA which would preclude extension of regulation under section 4A (as well as any other section of the Act), under various theories for piercing the corporate veil that have traditionally been applied by regulatory agencies in the enforcement context, to individuals who direct the actions of a corporate entity. Thus, nothing in the analysis of the scope of the term “any entity” in *NGA Jurisdictional Limits* would preclude application of the prohibition against market manipulation to individuals in cases where the corporate principal’s sales were NGA-jurisdictional sales. To date these questions, while raised at the agency level, have not benefitted from judicial examination. Except to the extent discussed in this footnote, those issues are beyond the scope of this article.

3. Judicial Construction of the Commission's NGA Jurisdiction

Review of court cases dealing with the Commission's exercise of delegated authority discloses a pattern of judicial decisions where the lawfulness of the exercise of regulatory power was resolved on the basis of the scope of the Commission's jurisdiction, as opposed to whether specific authority was described in the statute.³⁹ Those cases were reviewed in detail in *NGA Jurisdictional Limits* and that analysis will also not be repeated here.⁴⁰ What those decisions have in common, however, is that in each case the Commission's authority to regulate turned on interpreting the Commission's jurisdiction under the Natural Gas Act, or its sister statute, the Federal Power Act ("FPA"),⁴¹ rather than the statutory language describing the delegated power.⁴²

In assessing the relationship between statutory power and jurisdiction to exercise that power, it should be borne in mind that the Commission's perception of its own jurisdiction is far from infallible. Reviewing courts have frequently, and repeatedly, rebuffed attempts by the Commission to expand its jurisdiction beyond that conferred by statute.⁴³ In each of these decisions, the courts concluded that the language of the statute delineated FERC's jurisdiction more narrowly than FERC had asserted.⁴⁴ Indeed, in *CAISO*, the court went so far as to describe FERC's "stretching of the authority granted [to] it" as "overreaching."⁴⁵ *Texas Pipeline Ass'n* represents a recent example of judicial repudiation of such jurisdictional overreaching by the Commission.⁴⁶

III. APPLICATION OF NGA JURISDICTIONAL LIMITATIONS UNDER SECTION 1(B) TO FERC'S NGA AUTHORITY

A. Overview

Section 4A conferred on the Commission authority to prohibit "market manipulation." Specifically, section 4A authorizes FERC to prohibit "any entity" from engaging in conduct prohibited by the Commission "in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission"

39. See, e.g., *Panhandle E. Pipe Line Co.*, 337 U.S. 498 (1949); *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) [hereinafter *CAISO*]; *N. States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999); *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996); *Shell Oil Co. v. FERC*, 566 F.2d 536 (5th Cir. 1978); *Mobil Oil Corp. v. FPC*, 463 F.2d 256 (D.C. Cir. 1971).

40. Demarest, *supra* note 14, at 482-87.

41. 16 U.S.C. §§ 791-828c (2012).

42. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). The Supreme Court has expressly recognized that, where the provisions of the NGA and the Federal Power Act (FPA) are identical, the Court has a practice of citing cases under one statute as support for a ruling under the other statute. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (where "the relevant provisions of the two statutes 'are in all material respects substantially identical[,]'" it is the Court's "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes") (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

43. Demarest, *supra* note 14, at 471, 476-77; *CAISO*, 372 F.3d at 398, 401; *Tex. Pipeline Ass'n*, 661 F.3d at 259, 262, 264.

44. *CAISO*, 372 F.3d at 401, 403.

45. *Id.* at 402, 404.

46. *Tex. Pipeline Ass'n*, 661 F.3d at 264.

under the NGA.⁴⁷ As straightforward as this simple summary of the statutory text may be, it begs the question whether “any entity” includes entities which are not subject to the Commission’s “traditional” NGA jurisdiction as set forth in section 1(b) of the Act.⁴⁸

NGA Jurisdictional Limits maintains that the scope of the authority to prohibit market manipulation conferred by section 4A ultimately turns on whether the reference to “any entity” in section 4A expands FERC’s NGA jurisdiction (for purposes of section 4A) to “entities” other than “natural-gas companies” subject to FERC’s NGA jurisdiction under section 1(b) of the Act.⁴⁹ *NGA Jurisdictional Limits* also contended that, as a matter of statutory construction, NGA section 4A provides no basis for expanding the universe of entities subject to the Commission’s NGA jurisdiction without a corresponding amendment to NGA section 1(b), or express statutory language in section 4A itself extending the section’s jurisdictional reach beyond the scope of FERC’s NGA jurisdiction as defined by section 1(b).⁵⁰ The relevant legislative history of the enactment of section 4A reviewed in *NGA Jurisdictional Limits* provides no evidence of an intent by Congress to expand the scope of the Commission’s jurisdiction under NGA section 4A to entities not subject to the Commission’s NGA jurisdiction delineated in section 1(b) of the Act.⁵¹ The Fifth Circuit’s decision in *Texas Pipeline Ass’n* supports that analysis.⁵²

B. Market Transparency and *Texas Pipeline Ass’n*

1. NGA Section 23 – Market Transparency

EPAAct 2005 also amended the NGA by adding a new section 23 authorizing the Commission to promote market transparency.⁵³ Section 23 authorized FERC to obtain market information relating to pricing, sales quantities, and transported volumes from any market participant.⁵⁴

FERC implemented its new market transparency authority in Order No. 720, requiring reporting of market information by a wide range of “market participants.”⁵⁵ The Order required reporting by entities that are admittedly subject to FERC’s NGA jurisdiction, such as interstate pipelines and natural gas companies making NGA-jurisdictional sales.⁵⁶ The Order also required reporting of market

47. 15 U.S.C. § 717c-1 (2005). The extent to which the statutory reference to “in connection with” may expand the reach of the term “any entity” is an issue addressed in *NGA Jurisdictional Limits* that is not repeated here. Demarest, *supra* note 14, at 469-70, 483-86.

48. References herein to FERC’s “traditional” jurisdiction under NGA section 1(b) include the modifications to FERC’s jurisdiction set forth in section 601 of the NGPA. NGPA § 601 (as amended by Decontrol Act, Pub. L. No. 101-60, § 3(b)(7), 103 Stat. at 159 (codified as amended at 15 U.S.C. § 3431 (2012))).

49. Demarest, *supra* note 14, at 488-89, 497-500.

50. *Id.* at 490, 499-500, 504-06 (an example of which may be found in the companion EPAAct 2005 amendment conferring on FERC authority to prohibit market manipulation under the FPA).

51. *Id.* at 507.

52. See generally *Tex. Pipeline Ass’n*.

53. EPAAct 2005 § 316; 15 U.S.C. § 717t-2 (2012).

54. EPAAct 2005 § 316(a)(3); 15 U.S.C. § 717t-2(a)(3) (2012).

55. *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, 125 F.E.R.C. ¶ 61,211 at PP 28-30 (2008) [hereinafter Order No. 720].

56. *Id.* at 1-3.

information by “market participants” not otherwise subject to FERC’s jurisdiction under the NGA, including intrastate pipelines.⁵⁷

2. *Texas Pipeline Ass’n v. FERC*

The Texas Pipeline Association (“The Association”) challenged FERC’s imposition of regulatory reporting requirements on market participants that are not otherwise subject to FERC’s regulatory jurisdiction under the NGA, i.e., entities that are not “natural-gas companies” subject to the Commission’s jurisdiction under NGA section 1(b).⁵⁸ The Association argued that, notwithstanding section 23’s apparent authorization of FERC to require reporting of market information by “any market participant,” the EPAct 2005 amendment did not supersede the jurisdictional limitations imposed by section 1(b) of the NGA.⁵⁹

In *Texas Pipeline Ass’n*, the Fifth Circuit went back to basics, ruling that the jurisdictional limitations on FERC’s authority under the NGA prescribed by section 1(b) of the Act apply to all authorities under the Act, including newly enacted section 23 authorizing FERC to promote market transparency by gathering market data from “any market participant.”⁶⁰ The court ruled that the reference to “any market participant” in section 23 did not expand the Commission’s jurisdiction beyond the parameters defined by section 1(b).⁶¹

The reference in section 23 to “any market participant” in the context of newly conferred authority to gather market information is a striking parallel to the reference in section 4A to “any entity” in the context of newly conferred authority to prohibit market manipulation.⁶² Indeed, the jurisdictional issues involved in both sections are virtually identical. Hence, *Texas Pipeline Ass’n* is a strong precedent for the proposition that the reference to “any entity” in NGA section 4A does not authorize the Commission to apply its prohibitions against “market manipulation” to non-jurisdictional entities or activities.⁶³

Reported Commission decisions applying section 4A do not support a contrary conclusion because they do not reach the precise issue addressed in *NGA Jurisdictional Limits*. In an Initial Decision (“I.D.”) in an enforcement proceeding, an Administrative Law Judge (“ALJ”) concluded that *Texas Pipeline Ass’n* was not controlling because the case interpreted section 23 of the NGA, not section 4A.⁶⁴ The ALJ relied on the fact that in Order No. 670, the Commission found that section 4A “closely track[s] the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934.”⁶⁵ The purported distinction, based on parallels between section 4A and section 10(b) of the Securities Exchange Act of

57. Order No. 720, *supra* note 55, codified at 18 C.F.R. § 284.14 (2016) (“A major [intrastate] pipeline must [provide] on a daily basis” information relevant to the design capacity of each receipt or delivery point, and the amount scheduled at each such point. “The information . . . must remain posted for a period of one year”).

58. *Tex. Pipeline Ass’n*, 661 F.3d at 259.

59. *Id.*

60. *Id.* at 263.

61. *Id.* at 263-64.

62. Natural Gas Act, §§ 4a, 23 (2005).

63. *Tex. Pipeline Ass’n*, 661 F.3d at 263.

64. *BP America Inc.*, 152 F.E.R.C. ¶ 63,016 at P 151 (2015).

65. *Prohibition of Energy Market Manipulation*, F.E.R.C. STATS. & REGS. ¶ 31,202 (2006) [hereinafter Order No. 670]; *BP America Inc.*, 152 F.E.R.C. ¶ 63,016 at P 151, citing Order No. 670 at P 6.

1934 (“Exchange Act”) that are lacking with respect to NGA section 23, fails to address:

- (i) the legislative history of section 315 of EAct 2005;
- (ii) the significant differences between the statutory language of NGA section 4A and the text of the prohibition of market manipulation under section 222 of the Federal Power Act, simultaneously enacted in section 1283 of EAct 2005; and
- (iii) the uniquely distinctive jurisdictional limitations in section 1(b) of the NGA that are not present in the Exchange Act and which therefore undermine any attempt to rely on parallels between NGA section 4A and Exchange Act section 10(b).⁶⁶

The Commission affirmed the I.D., asserting that the Commission did not interpret NGA section 4A as permitting the Commission to adopt ongoing regulatory requirements applicable to “the ordinary business activities of non-jurisdictional entities,” as was the case in the order under NGA section 23 challenged in *Texas Pipeline Ass’n*.⁶⁷ The Commission asserted that instead the Commission’s interpretation of NGA section 4A allowed the Commission “only to reach non-jurisdictional transactions in which an entity intended to affect or acted recklessly to affect the price of a jurisdictional transaction.”⁶⁸

In terms of the binding effect of this precedent, however, the record in *BP America Inc.* disclosed that BP America was an affiliate of a pipeline.⁶⁹ Accordingly, the sales in question were NGA-jurisdictional sales in interstate commerce for resale and not NGPA first sales.⁷⁰ Therefore the issues addressed in this article respecting the scope of the NGPA exemption of first sales from NGA regulation were not implicated. More particularly, discussions of the “any entity” issue in the I.D. and Opinion No. 549 are pure *dicta* in view of the fact that BP America qualified as a “natural-gas company” fully subject to the Commission’s NGA jurisdiction.⁷¹

Similarly, the Enforcement Staff Report and Recommendation underlying the Commission’s Order to Show Cause in *Total Gas & Power North America, Inc.*, made clear that the transactions involved were sales in interstate commerce for resale that were not NGPA first sales due to the operation of NGPA section 2(21)(B) and the existence of an affiliate relationship with an intrastate pipeline.⁷² Therefore, neither the issues raised in *NGA Jurisdictional Limits* concerning the scope of “any entity” under NGA section 4A, nor the first sale issues addressed in this article were implicated in the *Total Show Cause* proceeding.⁷³

More fundamentally, neither the I.D. in *BP America Inc.* nor Opinion No. 549 addressed the broader analysis of the statutory language and the legislative

66. 15 U.S.C. § 78j(b) (2012); EAct 2005 §§ 315, 1283.

67. *BP America Inc.*, 156 F.E.R.C. ¶ 61,031 at P 303 (2016) [hereinafter Opinion No. 549].

68. *Id.* at P 303.

69. *Id.* at P 347, n.793.

70. *See generally id.*

71. 15 U.S.C. § 717a(6).

72. *Total Gas & Power N. Am.*, 155 F.E.R.C. ¶ 61,105, App. A at 75-76 (2016).

73. *Id.*

history set forth in *NGA Jurisdictional Limits*.⁷⁴ Respectfully, the author believes that the grounds relied upon by the Commission to distinguish *Texas Pipeline Ass'n* will not withstand judicial scrutiny (particularly before the Fifth Circuit) for the overarching statutory construction reasons identified in *NGA Jurisdictional Limits*. It is also worth noting that the Commission's other major foray, applying its market-manipulation regulations outside the context of NGA-jurisdictional sale transactions, was rejected by the D.C. Circuit.⁷⁵

3. Consequences of the *Texas Pipeline Ass'n* Decision

If, as *NGA Jurisdictional Limits* contends, and *Texas Pipeline Ass'n* suggests, the Commission's market-manipulation authority under NGA section 4A does not apply to "non-jurisdictional" entities and activities, then a determination must be made on a case-by-case basis whether specific activities sought to be prohibited under the market-manipulation rules occur in connection with activities that are either subject to the Commission's NGA jurisdiction as defined by section 1(b) of the Act, or are exempt from NGA regulation under section 601 of the NGPA.⁷⁶

With respect to transportation-related activities, in light of *Texas Pipeline Ass'n* it is likely that the Commission will be unsuccessful in applying its market-manipulation rules to transportation of natural gas in intrastate commerce, to gathering or local distribution of natural gas, or even to transportation of natural gas in interstate commerce by intrastate or interstate pipelines under NGPA section 311(a).⁷⁷ On the other hand, FERC's market-manipulation rules should still apply to transportation of natural gas in interstate commerce by Hinshaw pipelines and local distribution companies (LDCs) pursuant to a limited jurisdiction certificate issued under section 284.224 of the Commission's regulations.⁷⁸

With respect to sales of natural gas, in many instances, the classification of sales as "non-jurisdictional" is equally straight forward. Thus, "direct sales" of natural gas to an end-user are non-jurisdictional, and should be exempt from application of the Commission's market-manipulation prohibition.⁷⁹ Likewise, sales of natural gas wholly in "intrastate commerce," i.e., where the gas was produced, sold and consumed within a single state (and at no time in its gathering or transportation moved in interstate commerce), are exempt from the Commission's

74. Demarest, *supra* note 14, at 473-74, 487-89, 506-07.

75. *Brian Hunter*, 135 F.E.R.C. ¶ 61,054, *reh'g den.*, 137 F.E.R.C. ¶ 61,146 (2011), *rev'd*, *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013).

76. Demarest, *supra* note 14, at 473-74, 487-89, 506-07. Notwithstanding the I.D. and Commission decision in *BP America Inc.*, 152 F.E.R.C. ¶ 63,016 (2015), *aff'd*, Opinion No. 549, *supra* note 67. This article should not be interpreted to suggest that the author recommends or condones actions involving unregulated NGPA first sale transactions that would contravene FERC's prohibitions against market manipulation. Such is not the case. As *NGA Jurisdictional Limits* stated, if Congress wishes to extend FERC's regulatory authority in that manner it should do so through properly drafted legislation, not an amendment which ignores the fundamental structure of the NGA and its jurisdictional limitations. This article merely follows that admonition by suggesting that FERC should not be able to use a questionable, uncodified and judicially un-reviewed construction of the NGPA first sale definition to accomplish through that means that which FERC may not be able to achieve directly with respect to NGPA first sales.

77. It is exempt from NGA jurisdiction under NGA section 1(b). 15 U.S.C. §§ 717(b), 3371(a) (2012). The latter flows from the exemption of such interstate transportation from the Commission's NGA jurisdiction by section 601(a)(2)(A)(ii) of the NGPA. 15 U.S.C. § 3431(a)(2)(A)(ii) (2012).

78. 18 C.F.R. § 284.224 (2017).

79. 15 U.S.C. § 717(b) (2012).

NGA jurisdiction and, therefore, from FERC’s market-manipulation rules.⁸⁰ The significance of the exclusion of traditionally non-jurisdictional sales from the Commission’s market-manipulation authority is diminished greatly, however, by the nature of today’s natural gas commodity markets where flows of natural gas are anything but predictable, and where many, if not most, sales transactions are interstate sales-for-resale.

The exemption of NGPA first sales from NGA jurisdiction may provide yet another limitation on application of the Commission’s market-manipulation rules in the aftermath of *Texas Pipeline Ass’n*.⁸¹ Significantly, *Texas Pipeline Ass’n* holds out the prospect that the FERC prohibitions against market manipulation do not apply to activities in connection with interstate sales-for-resale if such sales-for-resale are NGPA “first sales” exempt from the Commission’s NGA jurisdiction.⁸² Thus, an examination of the scope of the exemption from NGA jurisdiction for NGPA first sales is required in order to assess the significance of *NGA Jurisdictional Limits* and *Texas Pipeline Ass’n* to application of FERC’s market-manipulation rules to sales transactions of greatest interest to natural gas producers and marketers.

IV. NGPA “FIRST SALES” VS. JURISDICTIONAL SALES UNDER BLANKET CERTIFICATE AUTHORITY

A. *Background – NGA Regulation of “Sales-For-Resale”*

Prior to enactment of the NGPA, all sales of natural gas in interstate commerce for resale were subject to the jurisdiction of the Commission under the NGA.⁸³ The consequences of NGA jurisdiction were substantial. The United States Court of Appeals for the D.C. Circuit observed,

[F]rom the *Phillips* decision forward (right through to the present . . .), jurisdictional gas was like a disastrous virus – highly communicable and, if not fatal, at least debilitating. . . . [J]urisdictional status brought with it the whole suffocating apparatus of Commission regulation over initiation of and termination of a sale, and the “justness” and “reasonableness” of the price.⁸⁴

This “suffocating” and “debilitating” regulatory apparatus “was widely regarded as a failure.”⁸⁵

B. *The Deregulatory Solution under the NGPA and the Decontrol Act*

The NGPA and the Decontrol Act addressed the failure of the NGA regulatory scheme by fundamentally changing federal regulation of sales of natural gas in three critical respects. First, Title I of the NGPA “largely supplanted the Commission’s pre-NGPA rules” by “subject[ing] every first sale to the NGPA system

80. *Id.*

81. 15 U.S.C. § 3431(a)(1)(A) (2012).

82. *Id.*

83. *See Phillips Petroleum Co. v. Wis.*, 347 U.S. 672, 677 (1954) (citing 15 U.S.C. § 717(b) (1940)).

84. *Hadson Gas Sys. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996).

85. *United Distribution Cos.*, 88 F.3d at 1123.

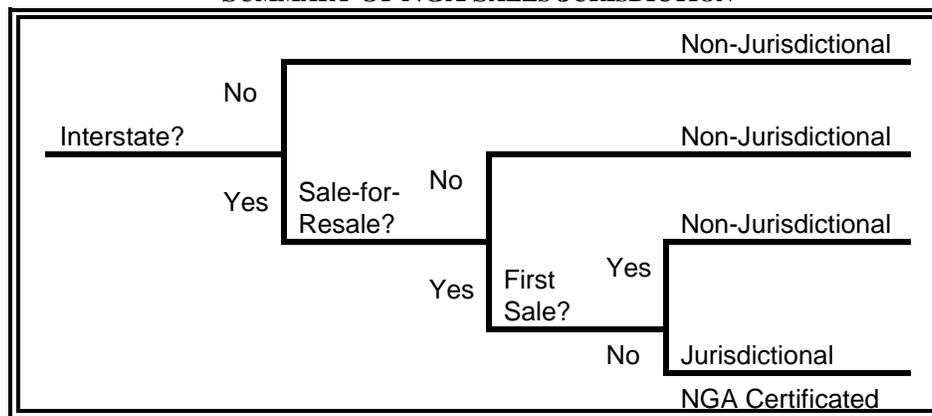
of price controls,” and, as originally enacted, by providing for phased price deregulation of some categories of natural gas.⁸⁶ Second, the NGPA terminated certification and abandonment under the NGA of most “first sales.”⁸⁷ Third, the NGPA declared that no person would be deemed to be a “natural-gas company” under the NGA solely by reason of making a “first sale.”⁸⁸

The Decontrol Act subsequently completed the process of deregulation. First, the Decontrol Act expanded the scope of price deregulation, begun under the NGPA, by repealing the residual Title I price ceilings not subject to price-decontrol under the NGPA as originally enacted.⁸⁹ Second, the Decontrol Act expanded the scope of non-price deregulation under the NGPA (i.e., elimination of NGA certificate and abandonment regulation, and tariff filing requirements) to all first sales of natural gas.⁹⁰

As a consequence of deregulation under the NGPA and the Decontrol Act, therefore, two subcategories of interstate sales-for-resale currently exist. The first subcategory is sales defined as “first sales” under the NGPA.⁹¹ These are exempt from NGA regulation including, for the reasons set forth in *NGA Jurisdictional Limits*, the FERC market-manipulation rules.⁹² The second subcategory is sales which do not qualify as NGPA first sales and which therefore remain subject to the Commission’s residual NGA sales authority, and accordingly, to FERC’s market-manipulation rules.⁹³

The decision tree analysis below summarizes the scope of NGA jurisdiction over sales of natural gas.

SUMMARY OF NGA SALES JURISDICTION



86. *Hadson*, 75 F.3d at 681 (citing 15 U.S.C. §§ 3312-19, repealed effective Jan. 1, 1993, Pub. L. No. 101-60 § 2(b), 103 Stat. 158 (1989)). See NGPA § 121 (1978).

87. NGPA §§ 601(a)(1)(A), (B); *Tenngasco Exch. Corp. v. FERC*, 952 F.2d 535, 536 (D.C. Cir. 1992) (The FERC’s NGA jurisdiction was “sharply limited” by the NGPA, which generally “eliminated the certificate requirement” for “first sales”).

88. NGPA § 601(a)(1)(D) (codified as amended at 15 U.S.C. § 3431(a)(1)(C) (2012)).

89. Pub. L. No. 101-60 § 2(b), 103 Stat. 157, 158 (1989).

90. Pub. L. No. 101-60, § 3(b)(7)(A), 103 Stat. 157, 159 (1989); 15 U.S.C. § 3431(a) (2012). See *Hadson*, 75 F.3d at 681 n.1.

91. NGPA § 601(a)(1)(A); 15 U.S.C. § 3431(a)(1)(A) (2012).

92. *Id.*

93. 15 U.S.C. § 717(b).

Only the last of these sales, labelled as “jurisdictional” under the decision-tree analysis, are made under NGA certificate authority.⁹⁴ Today, that authority is most commonly in the form of blanket sales certificate authority.

C. *NGPA “First Sales” – NGPA Section 2(21)*

Whether a particular sale or category of sales qualifies as a “first sale” may have significant economic implications if the seller’s activities are challenged by FERC under its prohibition of certain market-manipulation activities.

Analysis of the scope of the NGPA first sale definition begins where questions of statutory construction must begin – with the statutory language.⁹⁵ The NGPA definition of first sales “takes the form of a general rule, qualified by an exclusion.”⁹⁶ Specifically, subparagraph (A) of section 2(21) establishes the general “first sale” definition and subparagraph (B) creates a limited exclusion for certain sales by pipelines, LDCs and their affiliates (with a further exception to that exclusion – the so-called “attribution rule”):

(21) FIRST SALE.

(A) GENERAL RULE. The term “first sale” means any sale of any volume of natural gas–

- (i) to any interstate pipeline or intrastate pipeline;
- (ii) to any local distribution company;
- (iii) to any person for use by such person;
- (iv) which precedes any sale described in clauses (i), (ii), or (iii); [or]⁹⁷
- (v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this [Act].⁹⁸

(B) CERTAIN SALES NOT INCLUDED. Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.⁹⁹

Under subparagraph (A) of this definition, a sale of gas “to an end user,” “to any . . . pipeline,” or “to any local distribution company,” qualifies as a “first sale”

94. *Id.*

95. *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (“[T]he starting point in any case involving the meaning of a statute, is the language of the statute itself”). *See Am. Bar Ass’n v. FTC*, 430 F.3d 457, 467 (D.C. Cir. 2005).

96. *Pub. Serv. Comm’n of N.Y. v. Mid-La. Gas Co.*, 463 U.S. 319, 325 (1983) (*Mid-La.*).

97. NGPA, Pub. L. No. 95-621 § 2 (21)(A), 92 Stat. 3350, 3355 (1978), 15 U.S.C. § 3301(21)(A) (2012). The statute uses the conjunction “and” between clauses (iv) and (v). In *Mid-La.*, the Supreme Court recognized that the conjunctive “and” between clauses (iv) and (v) must be read disjunctively. 463 U.S. at 325 n.5 (“The text of clause (v) makes it plain that the . . . word ‘and’ at the end of clause (iv) was intended to be ‘or.’”). This construction is reflected in the quotation in the text.

98. Clause (v) is no longer operative following the repeal of Title I of the NGPA. *Hadson*, 75 F.3d at 682-83.

99. NGPA § 2 (21)(A); 15 U.S.C. § 3301(21)(A) (2012). It is noteworthy that the sales excluded from NGPA “first sale” status are sales that were historically subject to utility-type regulation and these regulatory regimes under state and federal law are generally preserved by the NGPA.

under clause (i), (ii) or (iii), respectively.¹⁰⁰ Importantly, clause (iv) expands the first sale definition to sales to purchasers other than end-users, pipelines and LDCs.¹⁰¹

Thus, subparagraph (A) of the definition collapses the chain of resale transactions, subjecting them all to regulation as “first sales.”¹⁰² Notably, purchasers in a first sale under clauses (ii), (iii) and (iv) might resell the gas to an end-user, pipeline, LDC or even to another marketer/reseller.¹⁰³ Reading sections 2(21)(A) and (B) together, it is apparent that Congress expansively defined “first sales” as all sales of natural gas other than sales by pipelines, LDCs or their affiliates of gas not “attributable to” the pipeline’s, LDC’s or affiliate’s own production.¹⁰⁴ Perhaps equally important, the scope of non-price deregulation under section 601 of the NGPA is likewise dictated by the scope of the first sale definition because only first sales of natural gas are removed from certificate, abandonment and rate regulation under the NGA.¹⁰⁵

At this point an aside is appropriate to acknowledge the lack of any formal legislative history respecting the structure of the NGPA first sale definition. Any student of the legislative process will confirm that, with the possible exception of one or two members of Congress most directly involved with management of the legislation, it is unlikely that any members of Congress focused on or considered the implications of this definition. Indeed, that is in fact the case. What then can we say about why Congress might have formulated the first sale definition in this manner?

As the principal legislative draftsman of the NGPA, and in particular the draftsman of sections 2(21) and 601, the author has a unique understanding of the origins of the first sale definition. At the time Congress was considering the NGPA, congressional committees were performing oversight of Department of Energy investigations of wide-spread violations of the then-existing oil price control regulations. A device known as a “daisy chain” was being used by marketers, particularly of crude oil, to increase the maximum lawful price of the lowest-priced categories of “old” oil by adding on a permissible marketer “margin.” The problems arose when a series of resale transactions were involved which could see the same crude oil pass through the hands of a marketer, or its affiliates, multiple times before being sold in an arm’s-length transaction to a refiner. The NGPA first sale definition was designed to preempt this abusive practice by applying the NGPA maximum lawful prices at the end-use level, effectively squeezing out any “add-ons” that a gatherer, processor, treater, or marketer might wish to add to its sales price. If permitted by FERC under NGPA section 110, and therefore “regu-

100. 15 U.S.C. § 3301(21)(A) (2012).

101. NGPA § 2(21)(A)(iv); 15 U.S.C. § 3301(21)(A)(iv). These are purchasers to whom sales of natural gas were already defined as first sales by clauses (i), (ii) and (iii).

102. 15 U.S.C. § 3301(21)(A).

103. *Id.* An “end-user” which makes such a sale thereby becomes a reseller.

104. Under clause (v) as originally enacted, even sales of natural gas by pipelines and LDCs that was not “attributable to” the pipeline’s or LDC’s own production (or that of an affiliate) could be deemed by FERC to be a “first sale” if necessary to avoid circumvention of the NGPA’s now-defunct price ceilings. 15 U.S.C. § 3301(21).

105. 15 U.S.C. §§ 3431(a)(1)(A), (b)(1)(A) (2012).

lated,” the cost of services such as gathering and processing could be “reimbursed.”¹⁰⁶ However, by collapsing the “first sale chain,” the NGPA first sale definition sought to assure (largely successfully) that the NGPA maximum lawful prices could not be circumvented by the practices utilized by some less-than-scrupulous crude oil marketers.¹⁰⁷ This is the context, therefore, within which one must evaluate any inferences respecting (i) “breaking” of the first sale chain, e.g., by a sale of natural gas to an LDC or pipeline whose resale would not constitute an NGPA first sale, or (ii) “reinstatement” of the chain following such a break.

D. Blanket Sales Certificate Authority

Prompted by full deregulation of “first sales” under the Decontrol Act,¹⁰⁸ FERC adopted Order No. 547 issuing “blanket sales certificates” to non-pipeline entities.¹⁰⁹ These blanket certificates authorized interstate sales-for-resale of natural gas that do not otherwise qualify as NGPA first sales.¹¹⁰ The scope of the blanket sales authority needs to be understood in order to appreciate the difficulty of distinguishing between first sales exempt from regulation under the NGA and NGA-regulated sales authorized under blanket certificates.

Blanket certificate authorization has a long history at FERC, having been employed in a variety of contexts, including, for example, blanket sales certificates issued to “small producers,” and blanket certificate authorizations issued to interstate pipelines under Subpart F of Part 287 of the Commission’s regulations.¹¹¹

Unlike these prior blanket sales certificate authorizations, however, blanket sales certificates issued under Order No. 547 did not require the blanket certificate holder to apply to FERC for the certificate.¹¹² Instead, the blanket sales certificates were issued by rule.¹¹³ As a result, blanket certificates were issued literally to everyone that was not a pipeline. Many industry participants may not even realize this fact.¹¹⁴

The companion to certification under section 7(c) of the NGA, section 7(b), provides that sellers may not cease making NGA-jurisdictional sales of natural gas

106. NGPA § 110, *repealed by* Decontrol Act § 2(b), Pub. L. No. 101-60 § 2(b) (1989), 103 Stat. 158 (effective January 1, 1993).

107. *Id.* As it turned out, not always successfully, but that was not known at the time.

108. Full deregulation under the Decontrol Act became effective January 1, 1993. Decontrol Act §§ 2(b), 3(b)(7), Pub. L. No. 101-60 §§ 2(b), 3(b)(7) (1989).

109. Order No. 547, *supra* note 5.

110. As indicated above, sales of natural gas in interstate commerce for resale by interstate pipelines did not qualify as NGPA first sales exempt from NGA certificate regulation. Such sales were authorized, however, by blanket sales certificates issued in connection with restructuring of interstate natural gas pipelines under Order No. 636, *supra* note 3.

111. 18 C.F.R. § 157.40(b) (1975). *See Exemption of Small Producers from Regulation*, 45 F.P.C. 454 (1971) (F.P.C. Order No. 428), as amended, F.P.C. Opinion No. 742, 54 F.P.C. 853 (1975); 18 C.F.R. § 157.201 (2016).

112. Order No. 547, *supra* note 5.

113. *Id.*

114. By analogy, many international travelers do not realize that they are the holders of blanket import licenses to re-import into the U.S. the clothes they are wearing and the personal goods with which they are traveling. Without those blanket import licenses, post-flight processing by the Immigration and Customs Enforcement personnel would undoubtedly be much more embarrassing than even the worst pre-flight security checks by the Transportation Security Administration.

without obtaining “abandonment” authorization from the FERC.¹¹⁵ Blanket sales certificates issued under Order No. 547 also generally eliminated this requirement through authorization of “pre-granted abandonment.”¹¹⁶

Furthermore, transactions authorized under the blanket certificates pursuant to Order No. 547 were exempted from the normal rate-filing requirements of the NGA, as well as substantive rate regulation pursuant to section 4(c) of the Act.¹¹⁷ In short, sales of natural gas under blanket certificate sales authority were effectively indistinguishable from fully deregulated NGPA first sales, except in one significant respect: blanket certificate sales are unquestionably subject to the Commission’s prohibition against market manipulation (enforceable by potentially millions of dollars in civil penalties) whereas, for the reasons set forth in *NGA Jurisdictional Limits*, it is probable that NGPA first sales will be found not to be subject to FERC’s market-manipulation regulations under NGA section 4A.¹¹⁸

At the time Order No. 547 was issued, EPAAct 2005 and the provisions authorizing FERC to prohibit market manipulation, as well as civil penalty authority for violations of the NGA, had not been enacted.¹¹⁹ Accordingly, there was little consequence to making interstate sales-for-resale under blanket certificate authority.¹²⁰ As a result, questions regarding the scope of the NGPA first sale definition were widely perceived as of little more than academic interest, with no real legal or economic consequence.¹²¹

In light of enactment of NGA sections 4A (authorizing FERC to prohibit “market manipulation”) and 23 (authorizing civil penalties of up to \$1 million per violation per day), however, that assumption should be reevaluated, particularly in light of the potential narrowing of the scope of the FERC’s authority under section 4A following *Texas Pipeline Ass’n*. Exposure to millions of dollars in potential civil penalty liabilities may turn on whether particular sales are made under blanket certificate authority or qualify as NGPA first sales for which no such authorization is required.

E. Narrowing of the First Sale Definition by Order No. 644

In Order No. 644, FERC adopted regulations under the NGA designed to prohibit certain manipulative conduct by jurisdictional sellers of natural gas.¹²² In

115. 15 U.S.C. § 717f(b) (2012).

116. 18 C.F.R. §§ 284.285, 284.402(d) (2017). See Order No. 644, *supra* note 19; 105 F.E.R.C. ¶ 61,217 at P 90 (2003).

117. 15 U.S.C. § 717c(c) (2012); Order No. 644, *supra* note 19, at P 1; 18 C.F.R. § 284.402(a) (2016).

118. See generally Demarest, *supra* note 14.

119. Order No. 547, *supra* note 5; see EPAAct 2005.

120. Order No. 547, *supra* note 5.

121. See generally Order No. 644, *supra* note 19.

122. *Id.* On October 20, 2005, FERC initiated a rulemaking under NGA section 4A. Notice of Proposed Rulemaking, *Prohibition of Energy Market Manipulation*, 113 F.E.R.C. ¶ 61,067 (2005). This rulemaking ultimately culminated in FERC Order No. 670. *Prohibition of Energy Market Manipulation*, FERC STATS. & REGS. ¶ 31,202 (2006). In anticipation of the outcome of that rulemaking, on November 21, 2005, FERC initiated a separate rulemaking to consider whether to revise or repeal aspects of the market-manipulation regulations adopted under Order No. 644 in light of the newly proposed prohibitions against market manipulation under NGA section 4A. Notice of Proposed Rulemaking, *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 113 F.E.R.C. ¶ 61,189 (2005). On January 19, 2006, acting under NGA section 4A, FERC issued Order No. 670 establishing a new set of prohibitions against

the same rulemaking, FERC also construed the NGPA definition of first sales in order to distinguish the sales subject to the standards of conduct regulations under Order No. 644 from those exempt from such rules by reason of the NGPA section 601(a) exemption of first sales from NGA regulation.¹²³ Thus, FERC recognized that under the Commission’s then-extant NGA authority, its rules establishing standards of conduct for sellers of natural gas could only apply to NGA jurisdictional sales, and not to NGPA first sales.¹²⁴

Order No. 644 recognized that clauses (i), (ii) and (iii) of subparagraph (A) of the NGPA define a “first sale” as “any sale to an interstate or intrastate pipeline, LDC or retail customer.”¹²⁵ Order No. 644 also recognized that clause (iv) of subparagraph (A) expands the category of sales covered by clauses (i), (ii) and (iii) to include “any sale in the chain of transactions *prior* to a sale to an interstate or intrastate pipeline or LDC or retail customer” that was not itself a sale to one of the purchasers identified in clause (i), (ii) or (iii), e.g., a sale to a marketer for resale.¹²⁶ Indeed, in this respect Order No. 644 recognized that clause (iv) is essential to covering the universe of potential purchasers by reference to which “first sales” are defined.¹²⁷

In Order No. 644, however, the Commission also interpreted clause (iv) of subparagraph (A) as imposing a major limitation on qualification for “first sale” status by sales otherwise defined as “first sales” under clauses (i), (ii), (iii), or (iv).¹²⁸ According to FERC’s reading of clause (iv), once natural gas has been purchased by a pipeline, LDC or retail customer, “the chain [of first sales] is broken, and no subsequent sale . . . can qualify . . . as a first sale.”¹²⁹

The validity of FERC’s construction of section 2(21) remains of vital interest to natural gas market participants for whom classification of their sales as NGPA first sales takes on added significance if, as contended in *NGA Jurisdictional Limits* and suggested by *Texas Pipeline Ass’n*, the Commission’s market-manipulation rules under NGA section 4A are not applicable to entities engaged in NGPA first sales.¹³⁰

market manipulation purporting to extend to non-jurisdictional entities and transactions. Thereafter, on February 16, 2006, the Commission issued Order No. 673, *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, FERC STATS. & REGS. ¶ 31,207 (2006), rescinding some, but not all, of the regulations adopted in Order No. 644. Most troubling for gas marketers and other non-utility sellers, Order No. 673 did not rescind FERC’s interpretative narrowing of the scope of the NGPA first sale definition.

123. See generally Order No. 644, *supra* note 19. This aspect of Order No. 644 remains as FERC’s uncodified and un-reviewed interpretation of the NGPA first sale definition.

124. *Id.*

125. *Id.* at P 14.

126. *Id.* (emphasis in original).

127. *Id.*

128. Order No. 644, *supra* note 19, at P 14.

129. *Id.*

130. Demarest, *supra* note 14, at 488. See generally *Tex. Pipeline Ass’n*.

V. THE FEREC'S INTERPRETATION OF THE "FIRST SALE" DEFINITION

A. *Order No. 644*

1. The FEREC's Statutory Analysis

As previously indicated, under FEREC's reading of clause (iv) of subparagraph (A) of the definition of "first sales," once natural gas has been purchased by a pipeline, LDC or retail customer, then "the chain [of first sales] is broken, and no subsequent sale . . . can qualify . . . as a first sale on natural gas."¹³¹ The FEREC's gloss on the language of clause (iv) lacks support in the language, structure or purpose of the statute. More specifically, FEREC's construction is fundamentally flawed for three reasons:

(1) The Commission's reading of clause (iv) is inconsistent with the wording of the statute and the purpose and structure of the statutory language.

(2) The Commission's construction of clause (iv) fails to give independent effect to clauses (i), (ii), and (iii), as required by *Mid-La*. The Commission's construction effectively elevates clause (iv) so as to trump clauses (i), (ii), and (iii) of subparagraph (A), without any support for the primacy of clause (iv) in the statute.

(3) The structure of section 2(21) firmly supports the conclusion that subparagraph (B) sets forth the only exclusion from first sales status of sales otherwise covered by the definition set forth in subparagraph (A). Because Congress excluded from "first sale" treatment only sales "by" traditionally regulated entities (pipelines and LDCs), there is no plausible basis for interpreting clause (iv) as narrowing the scope of the definition in the remainder of subparagraph (A).

a. The FEREC's reading of clause (iv) is contrary to the plain language of the statute.

The FEREC bases its "broken chain" construction on reading the word "any" in clause (iv) as meaning "every," as illustrated in the following excerpt:

(A) GENERAL RULE. The term "first sale" means any sale of any volume of natural gas—

(i) . . . ;

(ii) . . . ;

(iii) . . . ;

(iv) which precedes [every] sale described in clauses (i), (ii), or (iii);¹³²

Yet that is not what the statute says, and by substituting "every" for "any" FEREC does violence to the language chosen by Congress. "Any" means "any," and where more than one such sale may be involved, then a sale which precedes "any" one of the multiple sales is a first sale even if it does not precede every such sale.¹³³

b. Clauses (i), (ii), and (iii) of subparagraph (A) must be given

131. *Order No. 644*, *supra* note 19, at P 14.

132. 15 U.S.C. § 3301(21)(A) (2012). Note that the statute uses "any" where FEREC has interpreted it to mean "every." *Id.*

133. Subject only to the exclusion of subparagraph (B). See 15 U.S.C. § 3301(21)(B) (2012).

independent effect.

In *Mid-La.*, the Supreme Court recognized the possibility for there to be numerous “first sales” in a series of gas sales.¹³⁴ The Supreme Court also recognized that the conjunctive “and” between clauses (iv) and (v) of subparagraph (A) must be read disjunctively.¹³⁵ The consequence of this disjunctive construction is that each clause in subparagraph (A) is independent and coequal. Therefore, clauses (i), (ii), and (iii) must each be given independent effect, and a sale which qualifies as a “first sale” under clause (i) or clause (ii) or clause (iii) must be treated as such, regardless of whether such sale also qualifies as a “first sale” under clause (iv).

The Commission’s interpretation of clause (iv) excludes from “first sale” status sales of natural gas to a pipeline, LDC or end-user if the gas was previously owned by a pipeline, LDC or end-user. The FERC’s construction of clause (iv) thereby creates an artificial and unnecessary conflict between clauses (i), (ii), and (iii), on the one hand, and clause (iv), on the other, where no such conflict exists on the face of the statute.¹³⁶

c. Clause (iv) cannot be construed to “trump” clauses (i), (ii), and (iii) of subparagraph (A).

The FERC resolves the self-induced conflict between the coequal clauses of subparagraph (A) by construing clause (iv) as trumping clauses (i), (ii), and (iii).¹³⁷ Nothing in the structure of subparagraph (A) supports a construction of clause (iv) that elevates this clause above the other coequal clauses of subparagraph (A) so as to disqualify from “first sale” status any sale which otherwise qualifies as a “first sale” under clause (i), (ii), or (iii), merely because the sale follows a prior sale to a pipeline, LDC or end-user. A valid construction of subparagraph (A) must give meaning to the disjunctive and coequal structure of each of the independent clauses of subparagraph (A) recognized by the Supreme Court in *Mid-La.* The FERC’s construction of clause (iv) does not do so.

d. “Any” in clause (iv) cannot be construed to mean “every.”

To emphasize that “first sales” include any sale not excluded by section 2(21)(B), Congress used the word “any” six times in the first four clauses of section 2(21)(A):

The term “first sale” means *any* sale of *any* volume of natural gas –

- (i) to *any* interstate pipeline or intrastate pipeline;
- (ii) to *any* local distribution company;
- (iii) to *any* person for use by such person; [or]
- (iv) which precedes *any* sale described in clauses (i), (ii), or (iii);. . .¹³⁸

Order No. 644 isolates and places a different meaning on the sixth use of the word “any” in clause (iv).¹³⁹ In each of the first five instances, “any” is used as a

134. *Mid-La.*, 463 U.S. at 325-26.

135. *Id.* at 325 n.5.

136. 15 U.S.C. § 3301.

137. *Id.*

138. 15 U.S.C. § 3301(21)(A) (emphasis added). *See generally* NGPA.

139. Order No. 644, *supra* note 19, at P 38.

term of inclusion, assuring an expansive construction of the “first sale” definition. The FERC reads the sixth use of the term “any” in clause (iv), however, as meaning “every,” which, in context, is a term of limitation narrowing the definition of “first sale.” According to the Commission, one must interpret the phrase “precede any” in clause (iv) to mean “precede every” sale described in clauses (i), (ii), and (iii).¹⁴⁰

The FERC’s selective reading of the sixth “any” is taken out of context, ignoring other uses of “any” that modify clause (iv). Specifically, section 2(21)(A) defines “first sale” to include “any sale of any volume . . . (iv) which precedes any sale [to a pipeline, LDC or end user].”¹⁴¹ Because all gas will ultimately be sold in a sale to a pipeline, LDC or end user, or in a sale which will precede such a sale, the phrase “any sale of any volume . . . which precedes any sale [to a pipeline, LDC or end user]” includes all sales that precede a sale to a pipeline, LDC or end user, regardless of the identities of any past owners of the gas.¹⁴²

e. The FERC’s invocation of a “broken chain” concept has no basis in the statute.

Order No. 644 relies on the non-statutory concept, of FERC’s own creation, of a “broken chain,” under which gas is permanently “infected” with NGA jurisdiction based on any prior ownership of the gas (however incidental), by a pipeline, LDC or end-user.¹⁴³ The FERC cites no statutory or legislative history support for the concept of a “broken chain” that permanently renders gas molecules ineligible for “first sale” treatment. Given the specificity and detail with which the statute generally, and this definition in particular, are drafted, had Congress intended to engraft such a limitation onto subparagraph (A), undoubtedly Congress would have expressly done so. Thus, if the “broken chain” concept was intended, Congress could have expanded the exclusion in subparagraph (B). Or, Congress could have drafted clause (iv) as follows:

(iv) any sale which precedes every sale described in clauses (i), (ii), or, (iii);

or as follows:

(iv) any sale which precedes any sale described in clauses (i), (ii), or, (iii), *provided that the gas has not previously been owned by a pipeline, LDC or end-user.*

That Congress did none of those is persuasive evidence that FERC’s construction is erroneous.

2. The FERC’s Arguments on Rehearing Do Not Withstand Scrutiny

On Rehearing of Order No. 644, FERC gave two principal arguments to support its construction of section 2(21).¹⁴⁴ Neither withstands scrutiny.

a. The FERC’s concern for “impractical results” under a repealed

140. *Mid-La.*, 463 U.S. at 325-26.

141. 15 U.S.C. § 3301(21)(A)(iv).

142. *Id.* Except for sales by pipelines, LDCs and their affiliates are excluded by section 2(21)(B). 15 U.S.C. § 3301(21)(B).

143. Order No. 644, *supra* note 19, at P 14.

144. Order No. 644-A, *supra* note 19.

price control regime is misplaced.

The FERC contended that reestablishing the chain of “first sales” under clause (iv) would lead to “impractical results” “because the ceiling prices established by the NGPA for a first sale . . . would be re-imposed downstream after the gas had been sold pursuant to NGA jurisdiction.”¹⁴⁵ The Commission contended this may have “the perverse effect of requiring a buyer to accept an NGPA ceiling price for its gas sale which is less than the price it paid for the gas under NGA.”¹⁴⁶

It is peculiar that FERC would attempt to defend a massive extension of NGA regulation based on a highly-artificial hypothesis about “impractical results” that might have occurred under a price-regulation-regime that terminated more than two decades before Order No. 644 was promulgated.¹⁴⁷ The FERC’s claimed intent to avoid potential “perverse effects” under a repealed price control regime rings hollow when it is recognized that perverse consequences were unavoidable under that regulatory regime.¹⁴⁸ For example, El Paso Natural Gas found that the costs which the pipeline historically had been permitted to recover through its NGA-regulated cost-of-service-based rates applicable to company-owned production exceeded the NGPA maximum lawful prices.¹⁴⁹ El Paso was allowed to charge the higher cost-of-service based rates for its company-owned production, notwithstanding the extension of NGPA ceiling prices to pipeline-owned production under *Mid-La*.¹⁵⁰ Yet in Order No. 644-A, FERC ignored the historical realities which cast serious doubt on whether the consequences about which FERC expressed concern did indeed yield “impractical results.”¹⁵¹

The FERC’s focus on hypothetical “impractical results” under a defunct price control regime also ignores the fact that the existence of a problem alone (the alleged potential for “impractical results”) is not the basis for the exercise of regulatory authority where Congress has not delegated authority to the agency to act in the first instance.¹⁵² There is absolutely nothing in the NGPA which would support the contention that Congress intended to delegate to FERC the ability to cut back on, or restrict in any way, either the scope of the NGPA ceiling price rules applicable to first sales, or the scope of deregulation of first sales under section 601 of the NGPA.¹⁵³ As a jurisdictional argument, FERC’s concern for allegedly “impractical results” is unpersuasive.

145. *Id.* at P 28.

146. *Id.*

147. *Id.*

148. *Id.* Even in the pre-decontrol days, such a customer could have (a) chosen not to buy the gas, or (b) asked the NGA-regulated seller to sell for less than the NGA-regulated price, or (c) asked FERC for the right to charge a higher price under the NGPA.

149. *El Paso Nat. Gas Co.*, Order Approving Settlement, 31 F.E.R.C. ¶ 61,370 at p. 2 (1985).

150. *Id.* (“El Paso pays more for the gas produced from its [cost-of-service] properties than it can recover in its [NGPA] rates”).

151. Order No. 644-A, *supra* note 19, at P 28.

152. Which, as demonstrated, FERC has historically viewed as not particularly troubling. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (“Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law’”) (quoting *ETSI Pipeline Project v. Mo.*, 484 U.S. 495, 517 (1988)). See *CAISO*, 372 F.3d at 398; *Atl. City Elec.*, 295 F.3d at 8.

153. See generally Order No. 644, *supra* note 19. Had FERC applied this construction during the period of price regulation it would have excluded such sales from the NGPA Title I price regulations and subjected the

- b. The Commission's reliance by analogy on clause (v) to buttress its construction of clause (iv) lacks reasoned decision making.

On rehearing, the Commission also relied on clause (v) of the "first sale" definition as supporting the reasonableness of the Commission's construction of clause (iv).¹⁵⁴ The FERC argued that clause (v) "explicitly provides an exception allowing the Commission to re-establish a first-sale chain . . . when the Commission determines that it should do so in order to prevent the circumvention of a maximum lawful price established by the NGPA."¹⁵⁵ The Commission concluded that because clause (v) explicitly includes a provision allowing for the reestablishment of the "first sale chain" in only one specific circumstance, the Commission's construction of clause (iv) "as not allowing the chain to be reestablished in other circumstances" was reasonable.¹⁵⁶

1. The FERC's argument in reliance on clause (v) is circular.

The critical flaw in FERC's reasoning is that there is nothing in clause (v) to suggest that Congress intended clause (v) to limit in any way "first sale" eligibility under clauses (i) through (iv).¹⁵⁷ Clauses (i) through (iv) of subparagraph (A) define "first sales" as any direct or indirect sales "to" pipelines, LDCs or end-users, while subparagraph (B) identifies exclusions.¹⁵⁸ Clause (v) of section 2(21)(A) merely allows FERC to expand the potential range of "first sales" to include "sales by" entities that would otherwise be excluded from "first sale" status by subparagraph (B).¹⁵⁹ Contrary to FERC's rehearing analysis, nothing in section 2(21) either requires a continuous chain of "first sales" or infects gas once owned by a pipeline, LDC or end-user with a jurisdictional virus that is contagious so as to deny first sale (i.e., deregulated) status to the buyer's resale of the gas and all subsequent resale transactions.¹⁶⁰

Moreover, even when the chain of "first sales" is broken by a non-first-sale sale, i.e., a sale by a pipeline or by an LDC of gas not "attributable" to the pipeline's or LDC's own production, there is nothing in clause (v) that would render that clause as the exclusive means for re-establishing a subsequent chain of first sales.¹⁶¹ The FERC's argument that clause (v) is the exclusive means for reinstating a chain of "first sales" is circular because it depends upon the very construction of clause (iv) that FERC seeks to support. If the word "any" in clause (iv) is given the plain meaning urged here, then clause (iv) applies to sales after the chain of "first sales" has been broken, and, therefore, clause (v) is not the exclusive means for re-establishing a first sale after the "first sale chain" has been broken. The

excluded sales to NGA cost-of-service based rate regulation. Talk about impractical results! The proposed remedy – reimposition of NGA regulation – would have been even worse, crippling the development of viable resale markets.

154. Order No. 644-A, *supra* note 19, at P 28.

155. *Id.*

156. *Id.*

157. 15 U.S.C. § 3301(21).

158. *Id.*

159. 15 U.S.C. § 3301(21)(A)(v).

160. *Id.*

161. *Id.*

Commission may not bootstrap its construction of clause (iv) with a circular construction of clause (v) that is dependent upon the contested construction of clause (iv).

2. The FERC’s argument based on clause (v) relies on construing “any” in clause (iv) differently from the meaning historically placed by FERC on “any” in clause (v).

The FERC’s argument by analogy to clause (v) is also flawed because FERC’s reading of the word “any” to mean “every” in clause (iv) is inconsistent with the reading FERC historically placed on the same word in clause (v).

To prevent circumvention of the NGPA ceiling price rules, clause (v) authorized FERC to confer “first sale” status on any sale “which precedes or follows *any* sale described in clauses (i), (ii), (iii), or (iv).”¹⁶² The sales which FERC defined as “first sales” under clause (v) most certainly did not precede or follow “every” sale described in clauses (i), (ii), (iii), or (iv).¹⁶³ Indeed, if the word “any” in clause (v) were read consistently with FERC’s reading of “any” in clause (iv), clause (v) would be rendered a legal nullity through the same illogic that FERC uses to narrow the scope of clause (iv). That is because the sales defined by FERC as “first sales” under clause (v) could not simultaneously both precede and follow *every* sale described in clauses (i) through (iv).

That FERC gives a conflicting meaning to “any” in clause (iv), as opposed to that given to “any” in clause (v), undermines FERC’s claim that its interpretation of clause (iv) is reasonable.

B. *Is FERC’s Construction Entitled to Deference?*

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. generally recognizes a principle of “deference” by a reviewing court to certain agency determinations.¹⁶⁴ The question whether deference is owed to FERC’s construction of NGPA section 2(21) is likely to arise in connection with judicial review of an enforcement action in which FERC seeks to apply FERC’s prohibition of market manipulation under NGA section 4A to a market participant engaged in purportedly NGA-jurisdictional sales due to the narrowing of the NGPA first sale definition pursuant to Order No. 644.

The validity of FERC’s construction of the NGPA first sale definition may escape judicial scrutiny if a reviewing court grants *Chevron* deference to FERC’s construction. That outcome could follow from the complexity of the statutory language and judicial reticence to grapple with what may admittedly be characterized as an arcane issue of limited consequence (applying as it does only to a limited sector of the economy).

Nevertheless, substantial doubt exists as to whether *Chevron* deference should be accorded to FERC’s construction of the NGPA first sale definition. That is because courts have recognized that *Chevron* deference is not owed where the

162. *Id.* (emphasis added).

163. *Id.*

164. *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

intent of Congress is clear and unambiguously expressed in the language of the statute.¹⁶⁵

Under *Chevron*, broad categories of agency determinations are typically accorded deference. In the energy regulatory arena involving FERC determinations, issues related to application of complex ratemaking principles are typically afforded deference where agency technical expertise is presumed to be involved.¹⁶⁶ That is not the type of deference with which we are concerned here.

Rather, we are concerned with whether FERC's interpretation of the statutory language should be given deference. For this purpose, *Chevron* requires a two-step analysis.¹⁶⁷ As a general principle, deference to an agency interpretation of statutory language may be owed only where the statutory language is ambiguous.¹⁶⁸ Step one of the *Chevron* analysis therefore is to determine whether that language in question is ambiguous so as potentially to trigger *Chevron* deference.¹⁶⁹ It is important to note that whether the statutory language is ambiguous in the first instance is an issue for the reviewing court to decide, and the reviewing court owes no deference to the agency determination on whether the statutory language is or is not ambiguous.¹⁷⁰

In addition, "[d]eference to the agency's interpretation under *Chevron* is warranted only where 'Congress has left a gap for the agency to fill pursuant to an express or implied "delegation of authority to the agency."'¹⁷¹ As the D.C. Circuit also recognized in *Am. Bar Ass'n v. FTC*,

[T]he existence of ambiguity is not enough per se to warrant deference to the agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity. "Mere ambiguity in a statute is not evidence of congressional delegation of authority." . . . The deference mandated in *Chevron* "comes into play, of course, only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency."¹⁷²

In *CAISO*, the D.C. Circuit refused to defer to the FERC's jurisdictional determination where the Commission's interpretation of the statute was a "sufficiently poor fit with the apparent meaning of the statute" that the Court concluded the "statute is not ambiguous on the very question before" the Court.¹⁷³ More recently, the United States Court of Appeals for the Fifth Circuit explained in *Texas Pipeline Ass'n*,

Although the *Chevron* framework requires courts to give administrative agencies a substantial amount of deference in interpreting the statutes they administer, agencies cannot manufacture statutory ambiguity with semantics to enlarge their congressionally mandated border.¹⁷⁴

165. *Am. Bar Ass'n*, 430 F.3d at 468; *CAISO*, 372 F.3d at 399-400.

166. *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1518 (D.C. Cir. 1984) (deference to the expertise of the agency with regard to rate design).

167. *Chevron*, 467 U.S. at 842.

168. *Id.*

169. *Id.*

170. *Am. Bar Ass'n*, 430 F.3d at 468.

171. *Id.* (quoting *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)).

172. *Am. Bar Ass'n*, 430 F.3d at 469 (internal citations omitted).

173. *CAISO*, 372 F.3d at 401.

174. *Texas Pipeline Ass'n*, 661 F.3d at 264.

In this case, the structure of the statutory definition itself, and the detailed and precise language employed by Congress to identify “first sales” subject to deregulation, tend to negate any inference that Congress intended to delegate to FERC the authority to cut back or restrict the scope of the “first sale” definition in such a manner as would limit the scope of deregulation itself. Similarly, under the test applied in *CAISO*, FERC’s attempt to read clause (iv) of the statutory definition as a term of limitation, which trumps the independent and co-equal clauses (i), (ii) and (iii) of section 2(21)(A), may be a “sufficiently poor fit” to warrant denial of deference.

The potential for a prior ownership of natural gas by a pipeline, LDC or end-user to unknowingly disqualify all subsequent resales of the gas from deregulated “first sale” status is not theoretical. In today’s world, interstate pipelines, LDCs, and end-users sell natural gas in the market.¹⁷⁵ In each case, the gas may be purchased by a gas marketer and resold in numerous transactions. If FERC’s reading of section 2(21)(A)(iv) were correct, all entities that buy and resell gas would be exposed to potentially expanded NGA regulation, and to the Commission’s prohibition of market manipulation.

Such a consequence would have been especially problematic during the period of Title I ceiling price regulation of “first sales” as it would have subjected such resellers to cost-of-service based rate, certificate and abandonment regulation under the NGA. While FERC remedied these consequences by issuing blanket certificates in Order No. 547 authorizing such sales at market-based rates and approving pre-granted abandonment, it is unreasonable to believe that in drafting such a comprehensive regulatory regime as is embodied in the complex structure of the NGPA, Congress would have left such a gaping regulatory hole requiring action by FERC to close. Thus, while the question remains an open one, there are substantial reasons to believe that a reviewing court might not grant deference to FERC’s construction.

VI. PRACTICAL ADVICE

A. *Advice to Gas Marketers*

The foregoing analysis suggests that natural gas marketers should document transactions to demonstrate, whenever possible, that their interstate sales-for-resale of natural gas satisfy the NGPA first sale definition. In particular, if it is possible to trace the chain of title of the natural gas acquired by the marketer, documentation should be retained to demonstrate that the gas the marketer purchased was not previously owned by an end user, a pipeline or a local distribution company so as potentially to trigger FERC’s concept of a “break” in the chain of first sale transactions that cannot be followed by another unregulated first sale.

Where such documentation is not possible (and in today’s marketplace that is often likely to be the case), natural gas marketers should be prepared to make the arguments identified in this article in opposition to an assertion of regulatory jurisdiction by FERC. In this regard, because the timing of any assertion of lack

175. For example, interstate pipelines may sell gas collected from shippers to reimburse the pipeline for the costs of electric compression, or as a function of tariff-based imbalance resolution procedures.

of statutory authorization could become important, any assertion of lack or jurisdiction should be made in writing from the outset of any inquiry (however informal) by the Commission or its Office of Enforcement.

B. Advice for Integrated Producers

Today, a number of “independent producers” hold interstate or intrastate pipeline assets within their corporate structure.¹⁷⁶ Often these assets are relatively small entities; rarely do they provide a meaningful contribution to the corporate bottom line. Yet the ownership of even one of these entities, with negligible revenues, and even no sales of its own, could expose the corporate parent to millions of dollars in civil penalties related to the parent’s, or a sister company’s, sales of natural gas. That is because under subparagraph (B) of the first sale definition, the exclusion from NGA jurisdiction under subparagraph (A) does not apply to sales of gas by an affiliate of a pipeline or local distribution company unless the gas is “attributable” to the pipeline’s own production or that of an affiliate.¹⁷⁷ At minimum, subparagraph (B) triggers a separate inquiry whether the gas is “attributable” to the pipeline’s or affiliate’s production.¹⁷⁸ Thus subparagraph (B) could exclude the following sales from the exemption from NGA regulation afforded by subparagraph (A) of the first sale definition: (1) sales of gas acquired from third-parties by a marketing affiliate of the integrated producer; and (2) sales of gas produced by a co-working interest owner in a producing property and marketed by the producer/operator under a Joint Operating Agreement (“JOA”).¹⁷⁹

In both instances, the gas would not be “attributable” to the producer’s own production, and, therefore, would not qualify for the exception to section 2(21)(B)’s exclusion from first sale status for sales of gas by a pipeline or any affiliate.

Integrated producers which own pipeline assets should examine their marketing activities, particularly those involving purchases of gas from third parties and/or involving marketing of gas production of which is attributable to the interests of other working interest owners. One of the risk complications of any such purchases is the potential for the commingling of the third-party gas so acquired to taint as an NGA-jurisdictional sale 100% of the downstream resale of the commingled stream.

Options for integrated producers to consider in order to minimize the risk of exposure to civil penalties include (1) limiting marketing (purchase and sale) activities exclusively to sales of the producer’s own production (potentially eschewing even JOA marketing activities); (2) maintaining documentation of sales of gas “attributable” to the producer’s own production, while clearly segregating resales of gas purchased from third-parties from sales of gas “attributable” to the producer’s own production (avoiding commingling); and (3) divestiture of ownership of the potentially problematic pipeline affiliate.¹⁸⁰

176. Opinion No. 549, *supra* note 67, at P 7.

177. *Id.* at P 347.

178. *Id.*

179. For a discussion of other regulatory risks posed by marketing gas under typical JOAs, see William F. Demarest, Jr., *Gas Marketing by the Operator under a JOA – Unrecognized Regulatory Risks and Practical Solutions*, 64 OKLA. L. REV. 135 (2012).

180. Recommendation (a) may be contractually difficult or impractical to implement.

C. Advice for Respondents in FERC Enforcement Proceedings

Finally, the issues addressed in this article may be raised by any marketer or other seller of natural gas against whom FERC seeks to apply its uncodified construction of the first sale definition in Order No. 644. It is well settled that a party against whom a Commission rule or policy is applied may, at the time of application of the rule or policy, pursue substantive objections to the rule, including claims that the agency lacked the statutory authority to adopt the rule, even where the party had notice and opportunity to bring a direct challenge within statutory time limits.¹⁸¹ Thus, the absence of a judicial challenge to Order No. 644 does not preclude substantive judicial review of the Commission’s construction of the first sale definition in the context of defense against an enforcement action. As previously indicated, substantial doubt exists as to whether *Chevron* deference would be accorded to FERC’s position by a reviewing court.

VII. CONCLUSION

The Commission’s broken chain theory of clause (iv) of the definition of first sales under NGPA section 2(21)(A) exposes a potentially broad class of sales of natural gas to re-regulation under the NGA in contravention of the comprehensive deregulatory scheme embodied in the NGPA and the Decontrol Act. Given the care with which Congress prescribed exclusions in subparagraph (B) from the “general rule” set forth in subparagraph (A), a strong argument may be made that if Congress intended to create an exclusion from the “first sale” definition based on prior ownership of the gas, Congress would have done so expressly, rather than leaving such an important concept to be inferred from as slender a reed as construing “any” in clause (iv) as meaning “every” to support the novel concept of a “broken chain” found nowhere in the statute or its legislative history.

The author’s previous observation in *NGA Jurisdictional Limits* respecting FERC’s reading of “any entity” in NGA section 4A is equally apt with respect to FERC’s construction of the NGPA first sale definition.¹⁸² In *Whitman v. Am. Trucking Ass’n, Inc.*, the Supreme Court admonished that Congress “does not . . . hide elephants in mouseholes.”¹⁸³ If not an elephant, FERC’s “discovery” of an exception to the NGPA’s comprehensive deregulatory scheme is at least a sizeable rhinoceros, and its purported residence in clause (iv) of the NGPA “first sale” definition is indeed a most unlikely mousehole in which Congress “buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.”¹⁸⁴

181. *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (D.C. Cir. 2005) (“[A]gency rules can . . . be challenged on substantive grounds when they are applied, even though the statutory period for judicial review has expired”), *citing* *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34-35 (D.C. Cir. 1999). *See* *Graceba Total Commc’ns, Inc. v. FCC*, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997) (excusing failure to challenge original rulemaking); *Pub. Citizen v. NRC*, 901 F.2d 147, 152 n.1 (D.C. Cir. 1990); *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987); *Mont. v. Clark*, 749 F.2d 740, 744 n.8 (D.C. Cir. 1984) (“[W]here . . . the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review”); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958).

182. Demarest, *supra* note 14, at 500-01.

183. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

184. *Am. Bar Ass’n*, 430 F.3d at 469.