THE *CHEVRON* DEFERENCE RULE AND JUDICIAL REVIEW OF FERC ORDERS

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I. INTRODUCTION

Over the last fifty years, the Supreme Court has often functioned as a restraining force in administrative law by explaining, often to the U.S. Court of Appeals for the D.C. Circuit, that lower courts must limit themselves in reviewing agency decisions.[1] The Court's 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[2] continues that line of authority. There, the Court again reversed the D.C. Circuit because of its overly intrusive approach in reviewing administrative orders. In an opinion with potentially great influence on the future course of judicial review, the Supreme Court addressed a dispute involving an agency's interpretation of its statute. The particular controversy produced another significant administrative law opinion, which again clarified the proper relationship between reviewing court and administrative agency. Using language which resembled the warnings in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*,[3] the Court laid down strict rules about judicial review of administrative constructions, and suggested a virtual "hands-off" approach on the part of the lower courts in many circumstances. This article examines the *Chevron* case

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1. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978) (Apart from requisites of the Administrative Procedure Act, reviewing courts had no right to impose procedural strictures upon agencies, and should not "stray beyond the judicial province to" create their own version of what is " 'best' or most likely to further some vague, undefined public good."); FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331, 333, *remanded*, 562 F.2d 664 (D.C. Cir. 1976), *cert. denied*, 436 U.S. 930 (1978) (The reviewing court "overstepped the bounds of its reviewing authority" by "dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration . . . by the agency."); FPC v. Idaho Power Co., 344 U.S. 17, 20 (1952) ("When the court decided that the license should issue without the conditions, it usurped an administrative function . . . . [T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 144, 146 (1940) (Reviewing courts are not to "stray outside their province" by treating agencies as though they were lower courts, and are "not charged with general guardianship against all potential mischief in the complicated tasks of government.").

2. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

3. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). *Compare Vermont Yankee*, 435 U.S. at 525 (The court "seriously misread or misapplied [precedent] cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies.") *with Chevron*, 467 U.S. at 845 ("In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue.").

and analyzes its impact in the context of judicial review of orders of the Federal Energy Regulatory Commission (FERC or Commission).

II. THE *CHEVRON* DECISION

In the period prior to *Chevron*, Supreme Court decisions addressing the standard for judicial review of administrative statutory construction were inexplicably inconsistent. Judge Friendly wrote at the time that "there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand."[4] Some opinions reflected apparent de novo determinations of statutory questions and made no reference at all to considerations of deference to the underlying agency interpretations.[5] In *Packard Motor Car Co. v. NLRB*, the Court made its own independent analysis of the question whether foremen were "employees" within the meaning of the National Labor Relations Act. That the NLRB had already decided the issue in the underlying administrative proceedings seemingly played no role one way or the other in the court's analysis. The issue was seen as a "naked question of law."[6] The Court believed that it could brush aside arguments about the agency's alleged vacillation on the point, and simply decide the issue on its own. Similarly, in *Northeast Marine Terminal Co. v. Caputo*,[7] the Court decided whether the term "employee" in the Longshoremen's and Harbor Workers Compensation Act included persons employed in certain particular dockside tasks. Agency determinations sustaining the claimants' status as "employees" were barely mentioned, and then only in the Court's statement of facts. The Court's silence on the question of deference was all the more curious because Judge Friendly had sharply focused on the issue in the opinion below. Although some other Supreme Court cases did refer to the concept of deference to administrative constructions, they nevertheless took pains to point out that determining the meaning of statutes was, after all, a question of law on which the reviewing courts were to be final authorities.[8] Finally, there were cases which actually emphasized the deferential aspect in terms which seemingly gave that principle decisive weight.[9]

Chevron thus came before the Court against a background of uncertainty about the application and force of the deference concept. The case itself focused on the meaning of the term "stationary sources" in a provision of the Clean Air Act[10] which required permits for "construction and operation of

4. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

5. *See, e.g.*, Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

6. *Id.* at 493.

7. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

8. *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); Volkswagen v. FMC, 390 U.S. 261, 272 (1968), *modified*, 392 U.S. 901 (1968), and cases cited therein.

9. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) (upholding agency construction which was not "demonstrably irrational"); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944) (noting the agency's practical experience, the court's "limited" task, and the need to determine only if the agency interpretation has warrant in the record and a "reasonable basis in law").

10. Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982).

new or modified major stationary sources."[11] The Environmental Protection Agency (EPA) had construed the term as embracing a "plantwide" or "bubble" definition, which facilitated unlicensed installation or modification of equipment so long as total emissions within the plant (or "bubble") were not increased. Environmental groups successfully challenged this construction in the Court of Appeals for the D.C. Circuit, which held that because the term was not defined by Congress and the legislative history was contradictory, the particular program's purpose, to improve air quality, should govern. Measured by that standard, the D.C. Circuit believed that the EPA construction failed.[12]

The Supreme Court reversed, concluding that the D.C. Circuit had gone beyond the bounds of proper judicial review.[13] Justice Stevens, speaking for a unanimous, albeit six member, Court,[14] explained that an administrative construction poses two questions for a reviewing court. The first is "whether Congress has directly spoken to the precise question at issue." If so, the agency and the court "must give effect to the unambiguously expressed intent of Congress."[15] If, on the other hand, the statute "is silent or ambiguous with respect to the specific issue," then the reviewing court "does not simply impose its own construction," but rather determines whether "the agency's answer is based on a permissible construction."[16] If there is an explicit or implicit delegation of authority to the agency to construe the statute by promulgating regulations, then "[s]uch legislative regulations are given controlling weight," unless "arbitrary, capricious, or manifestly contrary to the statutes."[17] In such circumstances, a court may not substitute its own judgment for a "reasonable" agency interpretation.

The *Chevron* Court rebuked the D.C. Circuit Court for having "misconceived the nature of its role."[18] Having found that neither the language nor the legislative history of the Clean Air Act reflected any particular congressional intent as to whether the plantwide approach was applicable to the "stationary source" licensing, the court of appeals should not have decided for itself whether that definitional concept was appropriate for programmatic clean air purposes. Rather, that court should have limited itself to deciding whether EPA's view, espousing the appropriateness of the plantwide construction, was "a reasonable one."[19]

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11. *Id.* § 7502(b)(6).

12. Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom.* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

13. *Chevron*, 467 U.S. at 845.

14. Justices Marshall, Rehnquist and O'Connor did not participate in the decision.

15. *Chevron*, 467 U.S. at 843.

16. *Id.*

17. *Id.* at 844. Although *Chevron* involved interpretations reflected in agency regulations, the opinion's principles should apply equally to administrative constructions articulated in the course of adjudication. *See* Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 760 (1987) (citing *Chevron* and applying concepts of deference to individualized agency determinations made in discrete rate and licensing proceedings); United States v. City of Fulton, 475 U.S. 657, 663 (1986).

18. *Chevron*, 467 U.S. at 845.

19. *Id.*

In making the threshold inquiry as to whether Congress has itself resolved the issue so as to foreclose administrative choice, *Chevron*'s language suggests that the reviewing court's focus is to be narrow. The test is "whether Congress has *directly* spoken to the *precise* question at issue."[20] The Court's use of the word "directly" and its twice-mentioned phrase "precise question at issue"[21] suggest an intention to limit those instances where a reviewing court could find that one—and only one—exclusive meaning would necessarily control the agency. To command a particular meaning, and thereby oust the agency of any definitional discretion, the statute must reflect "the unambiguously expressed intent of Congress."[22]

The second step of *Chevron*, applicable if Congress has not spoken directly to the issue, limits the reviewing court to determining whether the agency's construction is "permissible" or "reasonable."[23] For purposes of this test, the opinion made clear that the agency's construction need not be the only permissible one, nor need it be "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[24] Moreover, the fact that the particular construction in issue reflected a change from the past, and may have been attributable to views of a new political administration was of no special significance.[25] Indeed, in somewhat circular reasoning, the Court saw the EPA's course changes as supporting the view that Congress envisioned administrative flexibility in defining the statutory term.[26]

In finding that the particular construction was entitled to deference, the Court relied on the presence of three factors: a "technical and complex" regulatory scheme; a "detailed and reasoned" agency order; and a substantive result which reflected the reconciliation of conflicting policies.[27] The Court, in conclusion, lectured to reviewing courts that judges (unlike agencies) have neither the specialized expertise nor the political responsibility for making policy choices, which Congress—for whatever reason—chose to leave to the administrative agencies.[28] Challenges which reduce themselves to debates about the wisdom of an agency's policy choice should fail because "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[29]

Chevron did not address the question of any tension which might exist between the dictates of deference and the Administrative Procedure Act's[30] provision that "the reviewing court shall . . . interpret . . . statutory provisions."[31] However, any theoretical conflict between the judiciary's responsi-

20. *Id.* at 842 (emphasis added).
21. *Id.* at 842-43.
22. *Id.* at 843.
23. *Id.* at 843, 845.
24. *Id.* at 843 n.11.
25. *Id.* at 856-57, 863-64.
26. *Id.* at 864.
27. *Id.* at 865.
28. *Id.* at 865-66.
29. *Id.* at 866.
30. Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1982).
31. *Id.* § 706.

bility for final determination of the meaning of statutes and the concept of deference to administrative constructions may be "more apparent than real."[32] As explained in *Montana v. Clark*,[33] the exercise of the judicial function to determine what the law is does not preclude deference under *Chevron*. "[D]eference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation."[34]

III. JUDICIAL REVIEW OF FERC ORDERS

As Justice Scalia has said, *Chevron* has become "an extremely important and frequently cited opinion, not only in this Court but in the Court of Appeals—as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent."[35] One court of appeals judge described *Chevron* as "a case which all appellate judges these days bear firmly in mind in reading statutes."[36] The case has been the subject of comment in several articles,[37] and, as of this writing, has been cited more than twenty-five times by the Supreme Court itself and nearly two hundred times by the courts of appeals.[38]

This article examines *Chevron*'s application to one agency, the FERC, by analyzing the impact of the decision in those cases where FERC orders have been challenged in the courts of appeals. Under relevant provisions of the Natural Gas Act (NGA),[39] the Natural Gas Policy Act of 1978 (NGPA),[40] and the Federal Power Act (FPA),[41] FERC orders are reviewable in the various circuit courts. Litigation involving these orders creates a significant area for studying *Chevron* deference principles at work. Such cases involve some of the very factors listed in *Chevron* as supporting deference—a "technical and complex" scheme, "detailed" agency orders, and the reconciliation of conflicting policies. The FERC is one of the most frequently challenged agencies in the courts of appeals.[42] Moreover, the cases themselves tend to involve significant disputes about major issues; the financial stakes are generally high; and

32. Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984), *cert. denied sub nom.* Montana v. Hodel, 474 U.S. 919 (1985).

33. *Id.*

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

35. INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1225 (1987) (Scalia, J., concurring).

36. *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 376 (1987) (remarks of Judge Kenneth W. Starr of the U.S. Court of Appeals for the D.C. Circuit).

37. *See, e.g., Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 247-55 (1984); Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation*, 1985 DUKE L.J. 469 (1985); Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); *Judicial Review of Administrative Action in a Conservative Era*, *supra* note 36.

38. *Judicial Review of Administrative Action in a Conservative Era*, *supra* note 36, at 358.

39. Natural Gas Act, 15 U.S.C. § 717r (1982).

40. Natural Gas Policy Act, 15 U.S.C. § 3416 (1982).

41. Federal Power Act, 16 U.S.C. § 825l (1982).

42. In 1986, there were 353 FERC appeals filed in all circuits. Only one other economic regulatory agency, the NLRB, was responsible for more courts of appeals administrative litigation. Two hundred and twenty of those 353 cases were filed in the D.C. Circuit—creating that Circuit's largest agency caseload.

the orders are seriously challenged and defended by a spectrum of well-represented interests. As noted, the bulk of FERC appeals are filed in the United States Court of Appeals for the D.C. Circuit. Because that court hears more agency cases than any other circuit, its decisions, in the context of review of an agency's orders, may well have a precedential impact which extends beyond the affairs of that particular agency.[43] For these reasons, a study of *Chevron*'s role in FERC litigation, while by no means conclusive for broad administrative law purposes, is nonetheless instructive.

Since June 1984, when *Chevron* was decided, its deference principles have been mentioned in eighteen separate courts of appeals cases involving review of FERC orders.[44] Of these eighteen cases, FERC constructions prevailed in most. The reviewing courts employed *Chevron* in sustaining FERC interpretations embodying significant policy determinations. The case played a major role in enabling a court to uphold a FERC construction which was diametrically opposite to the agency's earlier approach. *Chevron*'s impact extended beyond statutory constructions. The courts invoked *Chevron* as a basis for according judicial deference to constructions of documents. At the same time, however, despite *Chevron*, the Commission sustained several outright defeats in challenges to its statutory constructions.

A. Issues of Statutory Construction

As noted, *Chevron* deals with the question of a reviewing court's deference to administrative constructions of the underlying substantive statute. Though the courts have taken *Chevron*'s deference concept beyond these limits, this article examines *Chevron*'s impact on such pure statutory questions.[45]

Annual Report of the Director of the Administrative Office of the United States Courts, Table S-1, at 101 (1986).

43. *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 537 n.14 (1978).

44. Public Serv. Co. v. FERC, 832 F.2d 1201, 1225 (10th Cir. 1987); Northern Natural Gas Co. v. FERC, 827 F.2d 779 (D.C. Cir. 1987) (en banc); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987) (en banc), *cert. denied*, 56 U.S.L.W. 3591 (U.S. Mar. 1, 1988) (No. 87-771); Greensboro Lumber Co. v. FERC, 825 F.2d 518 (D.C. Cir. 1987); Associated Gas Distribs. v. FERC, 824 F.2d 981 (D.C. Cir. 1987); Vermont Dep't of Pub. Serv. v. FERC, 817 F.2d 127 (D.C. Cir. 1987); Williston Basin Interstate Pipeline Co. v. FERC, 816 F.2d 777 (D.C. Cir. 1987), *cert. denied sub nom.* ARCO Oil & Gas Co. v. Williston Basin Interstate Pipeline Co., 108 S. Ct. 748 (1988); Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (10th Cir. 1987), *cert. granted*, 108 S. Ct. 449 (1987); Public Serv. Comm'n v. FERC, 813 F.2d 448 (D.C. Cir. 1987); National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 200 (1987); Southern Cal. Edison Co. v. FERC, 805 F.2d 1068 (D.C. Cir. 1986); Aliceville Hydro Assocs. v. FERC, 800 F.2d 1147 (D.C. Cir. 1986); Pacificorp v. FERC, 795 F.2d 816 (D.C. Cir. 1986); Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986); Office of Consumers' Counsel v. FERC, 783 F.2d 206 (D.C. Cir. 1986); Washington Water Power Co. v. FERC, 775 F.2d 305 (D.C. Cir. 1985); Idaho Power Co. v. FERC, 767 F.2d 1359 (9th Cir. 1985); Atlanta Gas Light Co. v. FERC, 756 F.2d 191 (D.C. Cir. 1985).

45. Some courts had suggested that dictum in INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1220-22 (1987), limited *Chevron* so that reviewing courts need not defer to agencies on "pure" questions of statutory interpretation—but only on the application of statutory standards to a particular set of facts. *See, e.g.*, Union of Concerned Scientists v. NRC, 824 F.2d 108, 113 (D.C. Cir. 1987). But, in NLRB v. United Food and Commercial Workers Union, Local 23, 108 S. Ct. 413 (1987), Justice Scalia, joined by Chief Justice Rehnquist and Justices White and O'Connor, wrote a concurring opinion to make clear "the continuing and

An analysis of these cases shows that *Chevron* has unquestionably played a major, maybe even decisive, role in upholding significant new FERC constructions.

Measured by the regulatory significance of the particular outcome, *Chevron*'s most important invocation occurred in *Associated Gas Distributors v. FERC*,[46] which upheld the Commission's construction of the Natural Gas Act as allowing the agency to require that pipelines transport gas on a nondiscriminatory "open access" basis. Upon finding that the pipelines' substantial market power had been exercised to deny certain customers and others access to gas at the lowest, reasonable rate, the Commission had concluded in the challenged order that pipelines obtaining the advantages of blanket transportation certification had to agree to provide transportation for others on a nondiscriminatory or "open access" basis.[47] Pipelines questioned the Commission's authority under the NGA to impose such a requirement, arguing that the FERC had thereby mandated an assertedly prohibited "common carrier" status for them—a result which Congress itself had several times chosen not to adopt.

The court first noted the absence of any NGA language barring the Commission from imposing common carrier status on gas pipelines.[48] The court then examined the legislative history and found that it was, at best, a history of "congressional inaction" and therefore, unpersuasive. In the court's view, Congress' own decision not to require common carrier status did not mean that the Commission was forever powerless to achieve the same result if otherwise allowed by statutory provisions.[49] Noting the language of sections 4 and 5 of the NGA, the court found that the Act "fairly bristles with concern for undue discrimination," and rejected the pipelines' arguments as turning statutory construction "upside down, letting failure to grant a general power prevail over the effective grant of a specific one."[50]

The court's analysis concluded by drawing heavily on *Chevron* which, while "not a wand by which courts can turn an unlawful frog into a legitimate prince" nevertheless "bolsters our conclusion."[51] In an analysis drawn from *Chevron*'s first test (whether the statute dictated a particular result or, alternatively, was "silent or ambiguous with respect to the specific issue"), the court noted the NGA provisions which gave the Commission broad grants of power: to "stamp out undue discrimination"; to condition certificates as the public convenience and necessity may require; and to promulgate all rules as it may find necessary or appropriate to carry out the NGA's provisions.[52] Since these

unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*." Justice O'Connor was in the *Cardoza-Fonseca* majority, and, for this reason, the four-Justice concurrence takes on particular weight.

46. Associated Gas Distribs. v. FERC, 824 F.2d 981, 997-1001 (D.C. Cir. 1987).

47. *See* Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, [1982-1985 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,665, 50 Fed. Reg. 42,408 (1985).

48. *Associated Gas*, 824 F.2d at 997.

49. *Id.* at 997-98.

50. *Id.* at 998.

51. *Id.* at 1001.

52. *Id. See* NGA, §§ 5, 7, 16, 15 U.S.C. §§ 717d, 717f, 717o (1982).

were statutes conferring upon the agency a broad interpretational authority, and the NGA was "silent or ambiguous with respect to the specific issue" the conclusion readily followed: "Under these circumstances, *Chevron* binds us to defer to Congress' decision to grant the agency, not the courts, the primary authority and responsibility to administer the statute. The Commission's view represents 'a reasonable interpretation' of the Act, for which we may not substitute our view."[53]

The *Chevron* case also played a significant role in litigation challenging the extent of the Commission's regulatory powers over cogeneration. Section 210(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA) requires that:

> The Commission shall prescribe . . . *such rules as it determines necessary* to encourage cogeneration and small power production . . . *which rules require electric utilities* to offer to—
>
> (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and
>
> (2) purchase electric energy from such facilities.[54]

The Commission's implementing regulations contained a provision allowing electric utilities to seek waivers of the sale and purchase requirements.[55] Several utilities applied for and obtained waivers under that rule, making the particularized showing required by the regulations as to their need for relief. The owner of one affected cogeneration facility, desiring the economic advantage of the purchases which would otherwise have been required, opposed the waiver. The company challenged the FERC's statutory power to allow for waivers, arguing that the promotional rules were mandatory under the PURPA language.

In *Greensboro Lumber Co. v. FERC*,[56] the court, relying heavily on *Chevron*, upheld the Commission. Following the *Chevron* approach, the court turned first to the question whether section 210 itself "clearly resolves" the issue, and observed that "[i]t is not easy to reconcile the two clauses."[57] The first clause suggests that the agency has discretion to decide the extent to which the authorized promotional rules would be necessary. The second, relied upon by the cogenerator, is more demanding; its language seemingly mandates rules requiring electric utilities to sell to and buy from cogeneration facilities. The Commission, of course, emphasized the first clause, and argued also that the term "electric utilities" was generic, and not necessarily the equivalent of "each electric utility."[58] The parties agreed that the legislative history provided no meaningful support to either approach.

Given the existence of conflicting provisions and the absence of relevant legislative history, the *Greensboro* court pronounced the statute "ambiguous," and applied the *Chevron* deference rule. The court, relying on the authority of

53. *Associated Gas*, 824 F.2d at 1001, citing *Chevron*, 467 U.S. at 844.

54. PURPA, 16 U.S.C. § 824a-3(a) (1982) (emphasis added).

55. 18 C.F.R. § 292.403 (1987).

56. Greensboro Lumber Co. v. FERC, 825 F.2d 518 (D.C. Cir. 1987).

57. *Id.* at 521.

58. *Id.* at 521-22.

Chevron, stated that "Congress' clear commitment of PURPA's administration to the Commission is therefore all we need to defer to the agency if the construction of PURPA is reasonable."[59] As to the reasonableness of the FERC construction which allowed for individualized judgments, the court rested on the Commission's own reasoning as to the need for case-by-case examination of the circumstances presented by particular waiver applications. This approach has "bootstrap" elements; a construction is reasonable because the agency says it is. But in any event, the court deemed the regulation reasonable and concluded that "we follow the rule of *Chevron* and affirm the Commission's decisions."[60]

Chevron also contributed to the outcome in *Idaho Power Co. v. FERC*,[61] involving the agency's construction of the Federal Power Act's "necessary or convenient" standard for licensing hydroelectric facilities.[62] There, the Commission had dismissed a construction application, reasoning that a plant which would not be needed for at least twelve years—and probably not for sixteen years—was not now "necessary or convenient."[63] The applicant argued that the FERC should consider the option "of site banking," a process whereby the agency would grant requested project licenses before any showing of need, so as to facilitate construction when such need might arise. The FERC rejected this position as inconsistent with the Federal Power Act.

On review, the court sustained the agency in an opinion which turned on *Chevron*. The *Idaho Power* court paid scant attention to *Chevron*'s first test, concerning the effect of the statutory language itself, although the terms "necessary or convenient" would seem to reflect precisely the kind of congressionally-delegated administrative power for which *Chevron* commanded deference. Implicitly accepting that first *Chevron* test, the court went directly to the second, stating that "we must accept [the] FERC's interpretation if it is reasonable and not contrary to the Act."[64] The case thus turned wholly on the second aspect of *Chevron*—the reasonableness of the agency's construction—a test which the court found easily satisfied by the presence of provisions in the Act which required prompt implementation of licensed projects. These requirements would have been conceptually inconsistent with the "site banking" approach, and the Commission's decision against such "banking" was thus reasonable.

B. Constructions Which Reverse Prior Policy

The traditional view had long been that inconsistent administrative interpretations detract greatly from any deference to which the agency might otherwise be entitled.[65] Indeed in *Watt v. Alaska*, the Court rejected an

59. *Id.* at 522.

60. *Id.* at 523.

61. Idaho Power Co. v. FERC, 767 F.2d 1359 (9th Cir. 1985).

62. See FPA § 4(e), 16 U.S.C. § 797(e) (1982).

63. Idaho Power Co., 27 F.E.R.C. ¶ 61,175 (1984).

64. *Idaho Power*, 767 F.2d at 1363.

65. *See, e.g.*, Watt v. Alaska, 451 U.S. 259, 273 (1981); General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976); Morton v. Ruiz, 415 U.S. 199, 237 (1974); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

administrative construction, noting that the "Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference."[66] However, the *Chevron* case itself reflected precisely such an inconsistent interpretation. In 1980, the EPA had adopted a regulation which rejected the "bubble concept" for programs designed to enhance air quality. After a new administration took office, the agency examined the same program and changed its mind. It then promulgated a rule authorizing the earlier-rejected "bubble concept." That regulation triggered the *Chevron* litigation. This question of consistency was, nevertheless, no obstacle to deference in *Chevron*. Indeed, as the opinion stated:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded to the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.[67]

Under the *Chevron* holding, therefore, deference should apply even to agency interpretations which are inconsistent with past views. But despite *Chevron*, two later Supreme Court opinions revived the factor of consistency and explained that it would continue to be considered as an element contributing to deference.[68] However, *Chevron*'s express and deferential affirmation of an administrative change probably means that the factor of consistency is of significantly lesser weight than in pre-*Chevron* days.

In *Clark-Cowlitz, Chevron* played a prominent and pervasive role in litigation challenging a Commission decision which had diametrically changed the agency's earlier views about the meaning of a particular statutory term.[69] That case involved the Commission's construction of the municipal preference provisions in section 7(a) of the Federal Power Act.[70] The issue was whether that preference applied to relicensing proceedings. If so, a municipality was entitled to preferential consideration after expiration of the original license held by the stockholder-owned utility. If not, then a municipality's preference would have existed only at the time of the original licensing and, by its nature, would have had no meaning when the first license ran out. The Commission originally took the view that the statutory municipal preference applied to all relicensing.[71] This construction, vigorously challenged in the courts, was upheld in a pre-*Chevron* opinion which concluded, deferring to the interpretation of the agency, that the FERC construction was consistent with the Fed-

66. *Watt*, 451 U.S. at 273.

67. *Chevron*, 467 U.S. at 863-64.

68. INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987); NLRB v. United Food and Commercial Workers Union, Local 23, 108 S. Ct. 413 (1987).

69. Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3591 (U.S. Mar. 1, 1988) (No. 87-771).

70. 16 U.S.C. § 800(a) (1982).

71. City of Bountiful, 11 F.E.R.C. ¶ 61,337, *reh'g denied*, 12 F.E.R.C. ¶ 61,179 (1980) (overruled by Pacific Power and Light Co., 25 F.E.R.C. ¶ 61,052 (1983)).

eral Power Act's structure, scheme, and history.[72]

Meanwhile, the Commission had, as the *Clark-Cowlitz* dissent pointed out, "undergone a substantial change in personnel following the 1980 election."[73] In *Pacific Power and Light Co.*, the Commission reexamined its construction of the statute and concluded, as a policy matter, that the municipal preference should be inapplicable to relicensing and expressly overruled the prior construction.[74] The result, which reduced the municipal applicant to equal status in competing with private industry for a reviewed license, was precisely contrary to that sustained by the Eleventh Circuit in *Alabama Power*.[75] This new construction was the subject of the controversy which came before the court en banc in *Clark-Cowlitz*. The majority began its discussion by recognizing that "we must consider whether [the] FERC's new interpretation is permissible under the principles enunciated in" *Chevron*.[76] After examining the statute itself, the court concluded, in light of the *Chevron* formula, that Congress had not directly and specifically addressed the question of the preference's applicability to relicensing. That being so, the question narrowed to whether the Commission's new interpretation "represents a reasonable reading of the statute."[77] The court reasoned that the FERC's interpretation gave meaning to all of the relevant words of the particular statute, but acknowledged that the agency's interpretation was "not entirely free from doubt" because it was in tension with other phrases in the statute.

Thus, faced with what it recognized to be "plausible competing interpretations of statutes," the court explained that "[f]ortunately, we are not without guidance," because the Supreme Court had made clear "that a court cannot substitute what it considers the 'more natural' construction of an ambiguous statute for a reasonable interpretation advanced by an agency." Because the FERC's interpretation of section 7(a) is "reasonably susceptible to the interpretation proffered," the court concluded that it was "duty bound to uphold it."[78]

A policy shift from a pro-municipal utility construction to a pro-stockholder utility construction may well have been an understandable and logical outgrowth of a voter-directed change in government. What makes *Clark-Cowlitz* unusual is not that policy change followed political change, but that the reviewing court, speaking in scope-of-review terms, made it so easy for government to change policies. It is one thing to defer to an administrative construction, and in light of *Chevron*, it is equally appropriate to defer to a construction which may be inconsistent with prior views. But in *Clark-Cowlitz*, that deference extended to a construction which was diametrically opposed not only to precedent, but to prior court of appeals litigation sus-

72. Alabama Power Co. v. FERC, 685 F.2d 1311, 1318 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

73. *Clark-Cowlitz*, 826 F.2d at 1096.

74. Pacific Power and Light Co., 25 F.E.R.C. ¶ 61,052, *reh'g denied*, 25 F.E.R.C. ¶ 61,290 (1983).

75. *Alabama Power*, 685 F.2d 1311 (11th Cir. 1982).

76. *Clark-Cowlitz*, 826 F.2d at 1076.

77. *Id.* at 1087.

78. *Id.* (footnotes omitted).

taining that precedent.[79]

Many federal regulatory statutes are more ambiguous than the municipal preference licensing provision of the Federal Power Act. Some employ broad and general expressions such as "just and reasonable" or "public convenience and necessity" or "public interest" as standards for judging the propriety of an agency's work.[80] In *Chevron* terms, such statutes certainly cannot be said to "have directly addressed the precise question in issue."[81] They are more likely to be regarded as "silent or ambiguous with respect to the specific issue"[82] and thus candidates for the full force of the deference commanded by the Supreme Court. If an agency can properly read the same statute in opposite ways, as *Clark-Cowlitz* holds, these broad legislative terms provide fertile ground for policy shifting. To be sure, the courts have required that policy changes or departures from precedent be explained.[83] But *Chevron* suggests the inevitable failure of disputes which boil down to challenges to the "wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress."[84] With this starting point, the *Clark-Cowlitz* court's decisive en banc invocation of *Chevron* deference, in the teeth of prior judicial review upholding an earlier opposite result, may well facilitate future reassessments of precedent when agencies, for whatever reason, seek to change policies.

C. *Deference to Nonstatutory FERC Interpretations*

Although the *Chevron* case itself dealt only with matters of statutory construction, the D.C. Circuit has taken its implications well beyond that holding, by extending *Chevron*-type reasoning to various other matters. Judge Bork's opinion in *National Fuel Gas Supply Corp. v. FERC*,[85] contains a detailed exploration of *Chevron* and its expansion.

The question was whether a particular settlement had left open a pipeline's claim of entitlement to certain NGPA prices for its own gas production—a point which the Supreme Court had later decided favorably to pipelines.[86] The Commission concluded, adversely to the pipeline, that the settlement had extended to the valuation of the company's production, and had not reserved any right in the pipeline to reprice its gas in the event of

79. *See also* Pacificorp v. FERC, 795 F.2d 816, 821 (9th Cir. 1986) (In sustaining the agency's approval of the Bonneville Power Administration's construction of a statutory term, the Ninth Circuit recognized that even if the agency had changed a prior interpretation, as the petitioner had argued, *Chevron* nevertheless recognized the need for such administrative flexibility.).

80. *Cf.* NGA, §§ 3, 4, 7, 15 U.S.C. §§ 717b, 717c, 717f (1982).

81. *Chevron*, 467 U.S. at 843.

82. *Id.*

83. For applications of this rule to the Commission, see Grace Petroleum Corp. v. FERC, 815 F.2d 589, 591 (D.C. Cir. 1987); Hatch v. FERC, 654 F.2d 825, 834 (D.C. Cir. 1981). This requirement for explanation of change received little attention in the *Clark-Cowlitz* litigation, where the parties focused primarily on the fact of the change and its implications under principles of res judicata or collateral estoppel.

84. *Chevron*, 467 U.S. at 866.

85. National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 108 S. Ct. 200 (1987).

86. *See* Public Serv. Comm'n v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983).

success in the intervening Supreme Court litigation. In reviewing the pipeline's challenge to that construction, the court saw the "threshold issue" as whether it should give "any deference" to the Commission's construction of the settlement agreement.[87] Judge Bork, writing for the court, began the analysis by acknowledging that reviewing courts were divided on the question of the scope of review of such an administrative construction. Some had held that the matter was purely a question of law on which no deference was required; others had held that some deference was appropriate because of agency expertise. After recognizing that the D.C. Circuit cases had reflected some degree of deference,[88] the *National Fuel Gas* opinion concluded that *Chevron* "requires the court to give deference to an agency's reading of a settlement agreement even where the issue simply involves the proper construction of language."[89] In addition, the court reasoned that other factors such as the FERC's power to assure just and reasonable rates also warranted deference.[90]

The court of appeals stated that "[b]y far the most important" reason for its conclusion was the Supreme Court's *Chevron* decision, which Judge Bork regarded as having rejected the view that a court "may freely review an agency on pure questions of law."[91] Because *Chevron* had commanded deference to questions of statutory interpretation, which had hitherto been regarded as "pure" questions of law, the D.C. Circuit concluded that reviewing courts should similarly defer to other agency decisions, which, while they might involve purely legal issues, were nonetheless exercises of delegated power.[92]

As to the problem of construing settlement agreements, Judge Bork found that Congress had specifically delegated to the FERC a "broad range of adjudicative powers over natural gas rates," which embodied the processing of settlement proposals. Applying *Chevron*'s teachings about the need for deference to those administrative constructions of statutes reflecting congressionally-delegated authority, the court concluded that such a delegation compelled judicial deference to the FERC conclusions in the particular area—even on "pure" questions of law.[93] As for those earlier cases holding that deference should not be accorded to an agency's contract interpretations, *National Fuel Gas* reasoned that *Chevron* had implicitly altered those authorities. Indeed, Judge Bork believed that "*Chevron* principles alone" compelled deference to the agency's reading of the settlement agreement, but also noted the existence of the FERC's greater expertise and the congressional expectation that the Commission would "take an active role" in approving settlements.

While concluding that "we are bound to give deference to the Commis-

87. *National Fuel Gas*, 811 F.2d at 1568.

88. *See* Southern Cal. Edison Co. v. FERC, 805 F.2d 1068, 1072 (D.C. Cir. 1986); Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 953 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984).

89. *National Fuel Gas*, 811 F.2d at 1569.

90. *Id.* at 1570-71.

91. *Id.* The concurring opinion in NLRB v. United Food and Commercial Workers Union, Local 23, 108 S. Ct. 413, 426 (1987) (Scalia, J., concurring), confirms this reading of *Chevron*.

92. *National Fuel Gas*, 811 F.2d at 1570-71.

93. *Id.* at 1569-70.

sion's reading of the settlement agreement,"[94] the court nonetheless warned of circumstances where deference would be inappropriate: if the interpretation had "vacillated" so as to produce "inconsistent decisions" without justification;[95] or if the particular statute somehow reflected an intent that courts independently interpret the contracts.[96] Finally, the court suggested that deference might be inappropriate if the agency itself were an interested party to the settlement agreement—a factor not present in the *National Fuel Gas* dispute, which involved a settlement agreement entered into between the pipeline and various private parties.[97]

Having thus paved the way, by extending the requirement of deference to the Commission's construction of a settlement agreement, the court found it easy to affirm on the merits. It quoted the settlement language expressly resolving "all issues now pending before the Commission in the rate proceeding," and found that one of those questions was the issue of valuing the company-produced gas. There was no reservation of a right to seek adjustments if the ongoing litigation turned out favorably—an omission which the court found especially significant considering the presence in the agreement of other instances where the pipeline did reserve rights to make adjustments based upon future contingencies.[98]

This extension of *Chevron* principles to administrative actions other than statutory constructions continued in *Vermont Department of Public Service v. FERC*,[99] which sustained the FERC's interpretation of a contract entered into between a utility and a state commission for the delivery of electric power. Following the *National Fuel Gas* approach, the court found that the Federal Power Act had given the Commission "broad discretion to oversee energy rate regulation" by means of "authority to assure just and reasonable rates through adjudication."[100] Given this broad delegation, the court concluded that under *Chevron*, deference was compelled even on otherwise "pure" questions of law, such as contract interpretation. Here, as in *National Fuel*, the reviewing court again noted the existence of agency expertise, reasoning that "common sense also dictates deference" because the agency dealt daily with the subject.[101]

The D.C. Circuit has also employed *Chevron* deference principles in reviewing the Commission's interpretation of its own prior decisions. In *Public Service Commission v. FERC*,[102] the circuit court sustained the agency's interpretation of its own earlier decision imposing a burden on pipelines seek-

94. *Id.* at 1572.

95. The caveat about vacillation was not required by *Chevron*, which involved an administrative interpretation which was inconsistent with precedent, and made clear that such an event creates no exception to the ordinary deference rules. *But see* NLRB v. United Food and Commercial Workers Union, Local 23, 108 S. Ct. 413 (1987) (stating that consistency of construction remains relevant); INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987).

96. *National Fuel Gas*, 811 F.2d at 1571.

97. *Id.* at 1572.

98. *Id.* at 1573.

99. Vermont Dep't of Pub. Serv. v. FERC, 817 F.2d 127 (D.C. Cir. 1987).

100. *Id.* at 135.

101. *Id.*

102. Public Serv. Comm'n v. FERC, 813 F.2d 448 (D.C. Cir. 1987).

ing to recover the costs of institutional advertising. "Just as we give deference to an agency's interpretation of ambiguous statutes," the court reasoned, so "we also give deference to the Commission's interpretation of decisions made in accordance with such statutes."[103] Read literally, this reasoning leads to the conclusion that the degree of deference is directly proportional to the ambiguity of the underlying statute; the Commission's constructions of terms such as "just and reasonable" or "public convenience and necessity" should, therefore, command almost conclusive deference. Under any view, however, the court's willingness to extend *Chevron* to the Commission's pronouncements about what its precedents mean has potential significance for future agency policymaking.

Finally, the D.C. Circuit relied on *Chevron* in the context of reviewing the agency's construction of its own rules in *Aliceville Hydro Associates v. FERC*.[104] Citing *Chevron*, the court stated that "we are at minimum required to uphold the Commission's application of [the rule] if it is based on a permissible interpretation."[105] An agency's interpretation of its own regulations has long been treated as "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[106] *Chevron*'s impact on these constructions is, thus, probably less significant than its application to other areas.

D. Reversals of FERC Interpretations

In several instances, reviewing courts have set aside FERC constructions, even while acknowledging the existence and force of the Supreme Court's opinion in *Chevron*. Three of the cases turned on the particular construction's failure to qualify for deference under the *Chevron* thresholds—that the statutory language in question be sufficiently ambiguous and broad as to support the assumption that the agency was exercising congressionally delegated authority, and that the particular construction be reasonable.[107] Two cases turned on particular and unusual situations which led the courts to conclude that deference was unwarranted.[108] Another case dealt inadequately with *Chevron*,[109] while a fourth case reflected an apparent misreading of the *Chevron* principles.[110]

Because the Supreme Court granted certiorari in *Martin Exploration Management Co. v. FERC*,[111] the case necessarily takes on an obvious importance, and it could turn out to be the vehicle for clarification of the application

103. *Id.* at 455.

104. Aliceville Hydro Assocs. v. FERC, 800 F.2d 1147 (D.C. Cir. 1986).

105. *Id.* at 1150.

106. Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945).

107. Williston Basin Interstate Pipeline Co. v. FERC, 816 F.2d 777 (D.C. Cir. 1987), *cert. denied sub nom.* ARCO Oil & Gas Co. v. Williston Basin Interstate Pipeline Co., 108 S. Ct. 748 (1988); Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (10th Cir.), *cert. granted*, 108 S. Ct. 449 (1987); Office of Consumers' Counsel v. FERC, 783 F.2d 206 (D.C. Cir. 1986).

108. Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986); Washington Water Power Co. v. FERC, 775 F.2d 305 (D.C. Cir. 1985).

109. Northern Natural Gas Co. v. FERC, 827 F.2d 779 (D.C. Cir. 1987) (en banc).

110. Public Serv. Co. v. FERC, 832 F.2d 1201, 1225 (10th Cir. 1987).

111. *Martin Exploration*, 108 S. Ct. 449 (1987).

of deference under *Chevron*. The issue involved the pricing of gas which could qualify as either regulated or deregulated under the NGPA. The Commission interpreted the statute as providing that such dually qualified gas would be treated as deregulated.[112] Producers, seeking to maximize prices, challenged that rule.

The court of appeals began by turning to *Chevron* and repeating the Supreme Court's analysis concerning the appropriateness of deference when dealing with agency constructions of ambiguous statutes.[113] Next, the *Martin* court examined one of the statutes in question, section 121 of the NGPA.[114] While finding this particular provision to be ambiguous,[115] and presumably qualified for administrative constructions compelling deference, the court nevertheless found the deference approach inapplicable. It reasoned that the force of section 101(b)(5) of the NGPA[116] showed that the Commission's result was unreasonable and thus not entitled to deference under *Chevron*'s second requirement.

Section 101(b)(5) provides that if gas were qualified under more than one provision, "the provision which could result in the highest price shall be applicable." The Commission, as noted, took the view that the deregulated price "could" always go higher than a particular statutory price, and thus concluded that the gas in issue should be priced according to the marketplace. The court of appeals disagreed, reasoning that the "could" clause was "unambiguous," and had only one meaning: that the particular producer had the right to choose whichever price would produce, under its contract, the better result at the particular moment.[117]

The government successfully sought certiorari. As of this writing, the scope of any Supreme Court opinion is, of course, unknown, but the case nevertheless seems a reasonable candidate for further clarification of the *Chevron* deference rule. On its face, there is nothing so "unambiguous" about section 101(b)(5)'s "could" phraseology as to command but one reading. Indeed, one portion of the court of appeals' discussion seemingly recognizes "the obvious truth that the price of deregulated natural gas in an open market 'could' theoretically reach infinity."[118] At the same time, the court went on to explain how, in its view, there were other ways in which regulated gas prices "could" be higher than the deregulated price. If the statute is thus susceptible to these different readings, then it hardly qualified as "unambiguous," and deference should have been accorded to the agency's interpretation.

The court of appeals' opinion results in what the government correctly has called "a bizarre system of natural gas regulation," allowing producers such choice as to permit "repeated transfers of natural gas in and out of regu-

112. *See* 18 C.F.R. § 270.208 (1987).
113. *Martin Exploration*, 813 F.2d at 1065.
114. 15 U.S.C. § 3331(a) (1982).
115. *Martin Exploration*, 813 F.2d at 1066.
116. 15 U.S.C. § 3311(b)(5) (1982).
117. *Martin Exploration*, 813 F.2d at 1067.
118. *Id.* at 1068.

lation."[119] The Commission urged that it should prevail even "independent of any deference," but concluded its successful certiorari petition with the argument that even if the statute is "less than crystal clear, 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the agency' entrusted with administration of the statute."[120]

In *Williston Basin Interstate Pipeline Co. v. FERC,*[121] a court of appeals' unwillingness to accord deference to the FERC's construction of its NGPA rulemaking powers actually culminated in the dismissal of a challenge to one of the agency's orders. Section 503 of the NGPA[122] allows judicial review of Commission orders that reverse prior determinations of jurisdictional agencies regarding the entitlement of certain gas for incentive pricing. The statute provides that such determinations "shall not be subject to judicial review . . . except" when the FERC reverses the underlying determination.[123]

In *Williston Basin,* a utility which was to purchase gas sought to set aside a Commission order affirming a jurisdictional agency's determination that the gas was qualified for incentive pricing. The utility and the FERC took the view that the court of appeals had jurisdiction notwithstanding section 503 because the Commission's affirmance rested on application of substantive criteria which the FERC had promulgated under its broad section 501 rulemaking powers.[124]

The court saw the agency as attempting to do indirectly under section 501 what it could not do directly under section 503. No amount of "deference" could uphold that unattractive result. *Chevron* was of no use because the Commission's construction of section 501, as creating powers of judicial review, clashed with Congress' "unambiguously expressed intent" that there be no judicial review of affirmance. This outcome, though purportedly resting on *Chevron*'s first step, may also illustrate the second hurdle—i.e., the result was not "reasonable" because it contradicted another NGPA provision.[125]

The Tenth Circuit's decision in *Public Service Co. v. FERC,*[126] is another instance of a court's unwillingness to afford deference to a Commission interpretation of a statute which dealt with judicial review. Here, the question was whether the petitioner had properly preserved an issue for judicial review under section 313(b) of the Federal Power Act,[127] which precludes judicial review of objections not presented in application for rehearing—absent reasonable grounds for the omission. The Tenth Circuit disagreed with the Commission's view that the petitioner had failed to show reasonable grounds, relying

119. Federal Energy Regulatory Commission's Petition for a Writ of Certiorari, FERC v. Martin Exploration Management Co., No. 87-363, at 21, October Term, 1987.

120. *Id.* (citing *Chevron,* 467 U.S. 837 (1984)).

121. Williston Basin Interstate Pipeline Co. v. FERC, 816 F.2d 777 (D.C. Cir. 1987), *cert. denied sub nom.* ARCO Oil & Gas Co. v. Williston Basin Interstate Pipeline Co., 108 S. Ct. 748 (1988).

122. 15 U.S.C. § 3413 (1982).

123. *See* NGPA § 503(b)(4)(B), (c)(4), 15 U.S.C. § 3413(b)(4)(B), (c)(4) (1982).

124. *Williston Basin,* 816 F.2d at 782. *See* 15 U.S.C. § 3411 (1982).

125. *Id. Cf.* Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (10th Cir.), *cert. granted,* 108 S. Ct. 449 (1987).

126. Public Serv. Co. v. FERC, 832 F.2d 1201 (10th Cir. 1987).

127. 16 U.S.C. § 825l(d) (1982).

on analogous reasoning in an earlier opinion of the D.C. Circuit.[128]

As to the question of deference, the court announced that the issue—interpretation of the Federal Power Act— was "not one of fact requiring deferential review but rather one of law" and for this reason believed that it should "review the problem de novo."[129] For this proposition the court cited *Chevron*.[130] This language by the Tenth Circuit reflects a misunderstanding of *Chevron*. The Supreme Court did not say that a reviewing court was free to review questions of law de novo and without deference to the agency. Indeed, the thrust of the opinion is precisely the opposite. As previously discussed, many pure questions of law, imbedded in agencies' statutory interpretations, have been sustained by reviewing courts with substantial reliance on the *Chevron* deference formula. The Tenth Circuit's dichotomy between issues "of law" as opposed to issues "of fact" has no basis in the *Chevron* case and, indeed, robs the precedent of much of its meaning.

If the court wanted to avoid deference it might have done so by emphasizing that whether a party has shown good cause for failure to have raised an issue does not involve any formal FERC ruling—but rather rests on post hoc arguments of litigation counsel. Moreover, section 313(b) of the Federal Power Act is, after all, a procedural statute geared to judicial review, and its construction may well be more the business of the reviewing court than of the agency. It contains neither substantive regulatory authority nor the kind of broad delegatory language susceptible to administrative constructions which effectively declare regulatory policy. Thus, many of the reasons announced by the Court in *Chevron* are inapplicable to the FERC's construction of section 313(b). Be that as it may, the fact remains that there is no basis in *Chevron* for a court's evading the deference requirement by labeling the question "one of law."[131]

The decision in *Office of Consumers' Counsel v. FERC*,[132] presented an illustration of diverse application of the deference principles—prevailing as to one statutory interpretation, while at the same time, failing as to another. Section 601(c)(2) of the NGPA[133] authorizes pipelines to pass through to customers the cost of purchased gas "except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds." The FERC had construed the word "abuse" as reflecting a two-part test: where the practices "evidence reckless disregard of the pipeline's fundamental duty to provide service at the lowest, reasonable rate" and such policies "have a significant, adverse effect on customers or consumers."[134]

128. *Public Serv. Co.*, 832 F.2d at 1206 n.4 (citing Arkansas Power & Light Co. v. FPC, 517 F.2d 1223 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976)).

129. *Public Serv. Co.*, 832 F.2d at 1225.

130. *Id.*

131. *See also* NLRB v. United Food and Commercial Workers Union, Local 23, 108 S. Ct. 413 (1987) (Scalia, J., concurring) (emphasizing "the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*").

132. Office of Consumers' Counsel v. FERC, 783 F.2d 206 (D.C. Cir. 1986).

133. 15 U.S.C. § 3431(c)(2) (1982).

134. Columbia Gas Transmission Corp., 26 F.E.R.C. ¶ 61,034, at 61,100 (1984) *modified sub nom.* Office of Consumers' Counsel v. FERC, 783 F.2d 206 (D.C. Cir. 1986).

The court first examined the "reckless disregard" element in light of the statute's language. The court reasoned that the word "abuse" must have meant something more than mere "imprudence"—a standard long implicit in the Natural Gas Act and thus already applicable to pipelines. At the same time, "abuse" could not have been limited to misrepresentation, as the pipeline urged, because such an interpretation would virtually restate "fraud," and thus effectively read out "abuse."[135] The legislative history was inconclusive and showed only that either extreme (expanding to imprudence, or narrowing to misrepresentation) would be improper. Because neither the statutory language nor the legislative history "dictated a single meaning for 'abuse,' " the court applied *Chevron*, and concluded that its task was thus limited to determining whether the FERC-adopted element of "reckless disregard" was such as to fall "within the permissible range of accommodations of the various policies embodied in the NGPA."[136] The court saw the Commission's result as accommodating the two competing NGPA policies: avoiding too many obstacles to pass through which might establish "back door" regulation of producers, while maintaining the principle that pipelines must nevertheless operate efficiently under a duty to minimize costs. The agency's view that "abuse" embraced "reckless disregard" was thus reasonable and entitled to deference.

At the same time, the *Consumers' Counsel* court reached precisely the opposite conclusion as to the additional Commission requirement—that in order to constitute abuse, the reckless conduct must also have a significant, adverse effect on customers or consumers. The court reasoned that the statute authorizing passthrough "except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse or similar grounds," reflected Congress' description of what was "excessive"—i.e., overpayment due to fraud, abuse or similar grounds.[137] In the court's view, this catalog exhausted the field; there was no room under this provision of the NGPA for any other kind of excessiveness. Thus, an attempt to add an impact test was "inconsistent with the plain meaning" of the statutory language. In these circumstances, the outcome was contrary to clear legislative intent, and *Chevron* deference was inapplicable.[138]

There were three other instances in which the D.C. Circuit, while acknowledging *Chevron*, nevertheless declined to accord deference to FERC interpretations.[139] *Phillips Petroleum Co. v. FERC*,[140] although reversing the particular FERC construction, nonetheless reflected the court's willingness to employ *Chevron* deference in the proper circumstances. In *Phillips*, the Commission reached a particular construction of a section of the NGPA based on its reading of a Supreme Court case.[141] While acknowledging that the statute

135. *Consumers' Counsel*, 783 F.2d at 219-20.

136. *Id.* at 221.

137. *Id.* at 222.

138. *Id.*

139. Northern Natural Gas Co. v. FERC, 827 F.2d 779 (D.C. Cir. 1987) (en banc); Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986); Washington Water Power Co. v. FERC, 775 F.2d 305 (D.C. Cir. 1985).

140. *Phillips Petroleum*, 792 F.2d 1165.

141. Public Serv. Comm'n v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983).

in question was "admittedly ambiguous," and that the FERC interpretation was "arguably a permissible reading," the court declined to defer to the agency.[142] It did so not because of any failure to fit within *Chevron*'s confines, but only because, as the court viewed the result, the agency had not so much construed the NGPA as it had erroneously read the particular Supreme Court case. The *Phillips* court explained that deference was appropriate only when the Commission "exercised its *own* judgement."[143] In this case, the agency had never really construed the statute, but had rested on its own view of the Supreme Court case. In these circumstances, *Phillips* reasoned, there was simply no predicate for the invocation of *Chevron* deference principles.

A second case, *Washington Water Power Co. v. FERC*,[144] posed the question of competing claims for deference as between two government agencies—the FERC and the Department of Interior. The case involved the Commission's interpretation of a 1905 statute, and a conflicting construction articulated by the Secretary of Interior eighty years ago. In these circumstances, the *Washington Water Power* court, citing *Chevron* along with other deference cases, concluded that it was the original contemporaneous construction, and not the FERC's more recent and conflicting one, which was entitled to deference. To be sure, a court considers whether the interpretation was consistent and contemporaneous,[145] but there is no rule whereby an original or "contemporaneous" construction must inevitably command deference over a later and different view. Indeed, *Clark-Cowlitz*, as shown previously, recognizes that *Chevron* deference principles can properly facilitate an agency's change in its policy view.

The final D.C. Circuit case declining to accord deference came in the context of the court's en banc review in *Northern Natural Gas Co. v. FERC*,[146] of its earlier holding in *Panhandle Eastern Pipeline Co. v. FERC*[147]. *Panhandle* had struck down the FERC's attempt to create a revenue-crediting provision which the Commission had imposed on a pipeline certificate under the broad certification powers of section 7 of the Natural Gas Act.[148] In *Northern Natural*, the Commission asked the court to reexamine its prior holding.

The *Northern Natural* opinion acknowledged that it was undisputed that the statute was silent or ambiguous with respect to the particular problem, and review of the question of the Commission's interpretation of its conditioning authority was thus "governed by" *Chevron*.[149] In a lengthy footnote, the court explained that it read *Panhandle* as having already made a *Chevron* analy-

142. *Phillips Petroleum*, 792 F.2d at 1167, 1169.

143. *Id.* at 1169 (emphasis in original).

144. Washington Water Power Co. v. FERC, 775 F.2d 305 (D.C. Cir. 1985).

145. *See* NLRB v. United Food and Commercial Workers Union, Local 23, 108 S. Ct. 413, 421 n.20 (1987).

146. Northern Natural Gas Co. v. FERC, 827 F.2d 779 (D.C. Cir. 1987) (en banc).

147. Panhandle E. Pipeline Co. v. FERC, 613 F.2d 1120 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980).

148. 15 U.S.C. § 717f(e) (1982).

149. *Northern Natural*, 827 F.2d at 784.

sis.[150] This proposition, which was challenged by the dissent,[151] could not have rested on any particular language in *Panhandle* (which preceded *Chevron* by four years); but, at best, on the unarticulated implications of the original opinion.

In any event, the court's analysis of the FERC construction raises questions under *Chevron*. The Commission's argument that the disputed conditioning power did not amount to the altering of rates was brushed aside by the court without the slightest indication of any deference.[152] The court "quickly dispos[ed]" of the contention by referring to some uncited "lexicon of utility regulation" which it regarded as demolishing the Commission's construction.[153] If *Chevron* is to mean anything at all, an agency's construction of a concededly ambiguous statute, is surely entitled to more serious consideration than quick rejection by reference to some uncited "lexicon."

The court also gave weight to the fact that the Commission had not previously used its section 7 conditioning power in the way it did here, commenting in a footnote that "[t]he Commission has offered no evidence of a long-standing practice to use the conditioning power to alter existing rates."[154] But, as discussed above, there is no requirement of any such "long-standing" practice. Nothing in *Chevron* or in the concept of deference should penalize an agency for innovation. Indeed, *Chevron* made clear that deference is an eminently appropriate tool to be used in sustaining an agency's policy changes. Finally, the *Northern Natural* court rejected the Commission's argument that its use of the conditioning power was a practical means of preventing windfall, concluding that the statute and the case law otherwise gave the Commission powers to prevent such a result.[155] In this discussion there was, again, not the slightest indication of deference to the Commission's views which *Chevron* seemingly requires. Perhaps the majority's labored opinion was dictated by the judges' simple reluctance to admit that *Panhandle* was wrongly decided. But whatever the explanation, the *Northern Natural* dissent's conclusion that "[t]he majority offers no plausible explanation for its departure from the dictates of *Chevron*"[156] seems especially appropriate.

IV. CONCLUSION

Prior to *Chevron*, judicial deference to agency constructions was a principle of inconsistent application; indeed some commentators took the view that it entered or disappeared at the whim of the reviewing court. As Justice Marshall acknowledged, limitations upon the scope of judicial review (including deference) have sometimes been seen as rules which "are honored only when the Court finds itself in substantive agreement with the agency action at

150. *Id.* at 784 n.7.
151. *Id.* at 796 (Wald, C.J., dissenting).
152. *Id.* at 786.
153. *Id.*
154. *Id.* at 788 n.30.
155. *Id.* at 792.
156. *Id.* at 796 (Wald, C.J., dissenting).

issue."[157] Professor Davis' criticism reflected that approach:

> Deference for an agency's interpretation of law is typically unmentioned in Supreme Court opinions in which the Court substitutes its interpretation for the agency's. Indeed, such deference seems to be absent whenever the Court disagrees with the agency's interpretation. "Deference" becomes a concept that is useful when the Court is in doubt about the interpretation but is satisfied to let the agency's decision stand.[158]

These views, written before *Chevron*, came at a time when, as Judge Friendly correctly observed, "there are two lines of Supreme Court decisions [on deference] which are analytically in conflict."[159]

Whether judicial deference to administrative interpretations will retain that on-again off-again quality, notwithstanding the clarity and force of the Supreme Court's language in *Chevron*, is yet an open question. Any conclusive opinion about *Chevron*'s impact or consistency ought to rest on a period longer than three years, and, ideally, on an examination of the outcome of all litigation challenging administrative constructions—a study beyond the scope of this article. But even within the narrower context of FERC litigation, some tentative observations are nevertheless pertinent.

From the face of things, the language of the opinions themselves makes clear that *Chevron* has played a major role in sustaining several important FERC orders.[160] Indeed, *Chevron*'s emphasis in *Clark-Cowlitz* may well ease the way for politically-inspired changes of policy by agencies. Whether these cases would have come out the same way before *Chevron* is, of course, unknown. But the courts' pre-*Chevron* emphasis on consistency as an element which entitled administrative constructions to deference[161] might have precluded deference for the dramatic turn-around in statutory construction which occurred in *Clark-Cowlitz*. In any event the fact remains that the courts have on important occasions placed *Chevron* deference on the scales, given it great weight, and come out in favor of the agency. The courts' particularized emphasis on *Chevron* in several cases suggests that *Chevron*'s principles have more than ad hoc significance, and are a significant force in FERC litigation.

This is not to suggest that *Chevron* has inevitably carried the day for the Commission. Putting to one side those disputes which did not clearly pose questions of deference to the FERC constructions,[162] the courts have occasionally declined to accord deference to the Commission's interpretations. In these cases, the courts, while acknowledging *Chevron*, have taken the view

157. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 712 (1980) (Marshall, J., dissenting).

158. 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE 403 (2d ed. 1984).

159. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976), aff'd sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

160. *See, e.g.*, Associated Gas Distribs. v. FERC, 824 F.2d 981 (D.C. Cir. 1987) (upholding the Commission's open-access program for pipelines).

161. *See supra* note 65.

162. *See* Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986) (deference not required for the FERC's construction of particular Supreme Court opinion); Washington Water Power Co. v. FERC, 775 F.2d 305 (D.C. Cir. 1985) (a competition for deference between the FERC and the Department of Interior).

that a particular statute was either not so ambiguous as to qualify for deferential construction,[163] or that the particular FERC construction was unreasonable in that it clashed with some other statutory provision.[164]

There have also been instances where the courts have either ignored *Chevron*, or dealt with it only superficially. Thus, in *Middle South Energy, Inc. v. FERC*,[165] the D.C. Circuit reversed the Commission's interpretation of its statutory power concerning suspension of initial rates. The opinion seemingly substitutes the court's own view for that of the agency, while making no mention whatsoever of *Chevron*, or of any notion of deference. This silence was all the more telling when the opinion is read in light of the dissent, which would have sustained the agency in part because the Commission's "current interpretation merits deferential judicial consideration."[166]

The en banc opinion in *Northern Natural Gas Co.*,[167] while acknowledging *Chevron*, nevertheless set aside the Commission's construction of its powers under the Natural Gas Act. As explained, the opinion leaves much to be desired in terms of its approach to deference. Here again, it was the dissent which emphasized the concept of deference, and criticized the majority opinion for offering "no plausible explanation for its departure from the dictates of *Chevron*."[168]

Finally, the recent decision in *Midwest Gas Users Association v. FERC*,[169] reversed a Commission construction of the NGPA and of agency regulations. As in *Middle South Energy*,[170] the opinion seems to rest on little more than a de novo review of the pros and cons of the FERC's result (as compared with the court's result) without any recognition of deference principles. The doctrine of deference was not discussed, and *Chevron* was not cited—an omission which was especially glaring because the Commission's brief argued for deference and cited *Chevron* extensively.[171]

One public interest practitioner, while arguing that deference should be "neutral," has observed that deference to the incumbent political administration might be desirable to some persons, who would have difficulty in deferring to the decisions of a newly elected opposition administration.[172] An examination of FERC cases shows that ideological orientation—at least thus far—seems to play no role. It is true that Judges Bork and Starr, both Reagan appointees and leading spokesmen for judicial restraint, have written exten-

163. *See* Office of Consumers' Counsel v. FERC, 783 F.2d 206 (D.C. Cir. 1986).

164. Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (10th Cir. 1987), *cert. granted*, 108 S. Ct. 449 (1987).

165. Middle S. Energy, Inc. v. FERC, 747 F.2d 763 (D.C. Cir. 1984), *cert. dismissed*, 473 U.S. 930 (1985).

166. *Id.* at 774 (R. Ginsburg, J., concurring in part and dissenting in part) (citing *Chevron*, 467 U.S. 837 (1984)).

167. Northern Natural Gas Co. v. FERC, 827 F.2d 779 (D.C. Cir. 1987) (en banc).

168. *Id.* at 796 (Wald, C.J., dissenting).

169. Midwest Gas Users Ass'n v. FERC, 833 F.2d 341 (D.C. Cir. 1987).

170. Middle S. Energy, Inc. v. FERC, 747 F.2d 763 (D.C. Cir. 1984), *cert. dismissed*, 473 U.S. 930 (1985).

171. Brief for Federal Energy Regulatory Commission at 20-22, *Midwest Gas Users*, 833 F.2d 341.

172. *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 375-76 (1987) (remarks of Alan B. Morrison, Esq.).

sively about deference.[173] But in *Northern Natural*, the opinion, which ultimately reversed the agency's construction, was written by Judge D.H. Ginsburg, a Reagan appointee; while the dissent, criticizing the majority for failing to deal meaningfully with the question of deference, was written by Chief Judge Wald, a Carter appointee and certainly no advocate of judicial restraint.[174] Similarly, the *Middle South Energy* opinion—which set aside a FERC construction without even mentioning deference—was written by Judge Bork, while the dissent, urging deference, came from Judge Ruth Ginsburg, another Carter appointee. Moreover, Judge Bork's omission in *Middle South* is even less understandable in light of his extensive reliance on *Chevron* in extending deference beyond pure questions of statutory interpretation in *National Fuel Gas*. In the context of FERC litigation over the last three years, there is no basis for an inference that conservative judges had somehow deferred to "their" government, while other judges took a more activist role.

Whatever the pattern may be, an uneven application of deference principles weakens a system which depends upon the courts to review the agencies. Limitations on judicial review, like other rules of law, should apply across the board. They are not ad hoc tools to be picked up or put down whenever the court believes they are needed to do a particular job. Such an approach leaves too much to subjective whim, weakens any concept of predictability, and makes risky litigation even more of a gamble than it ought to be. Perhaps the Supreme Court opinion following the grant of certiorari in *Martin Exploration* will contribute to greater uniformity in applying the rules regarding deference to administrative constructions.

173. *See, e.g.*, National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 108 S. Ct. 200 (1987); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987) (en banc), *cert. denied*, 56 U.S.L.W. 3591 (U.S. Mar. 1, 1988) (No. 87-771).

174. *See generally* Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135 (1982).