

“TRADITIONAL” NGA JURISDICTIONAL LIMITS CONSTRAIN FERC’S MARKET MANIPULATION AUTHORITY

*William F. Demarest, Jr.**

Synopsis: Recently enacted Natural Gas Act (NGA) section 4A authorizes the Federal Energy Regulatory Commission (FERC or Commission) to prohibit manipulation of certain federally regulated energy markets by “any entity.” In Order No. 670, the FERC asserted an expansive view of its jurisdiction under section 4A as not limited to entities to which the FERC’s “traditional” NGA jurisdiction under section 1(b) applies. This article explores the question whether the FERC’s jurisdiction under NGA section 4A for purposes of enforcing regulatory prohibitions against “market manipulation” by any entity is limited by the scope of the FERC’s NGA jurisdiction under section 1(b) of the Act.

The FERC offers a potpourri of rationales in support of its expansive reading of its jurisdiction under section 4A, including: (a) the import of the word “any” as a modifier of “entity;” (b) Congress’ choice of “any entity” rather than “natural-gas company” in drafting section 4A; (c) the meaning of the phrase “in connection with” as drawn from the Securities Exchange Act rather than from the construction given to the same term in other sections of the NGA itself; (d) the inclusion of the words “directly or indirectly;” (e) section 4A’s reference to regulations “in the public interest or for the protection of ratepayers;” and (f) legislative history of questionable relevance, including a purported “broad remedial purpose” of section 4A. The article identifies serious deficiencies afflicting *every element* of the FERC’s analysis.

Application of the “plain meaning” rule of statutory construction to construe “any entity” as broadly conferring on the FERC market-manipulation authority over “entities” outside the Commission’s traditional NGA jurisdiction produces a direct conflict with the “plain meaning” of section 1(b). The “plain meaning” of the term “any entity” relied on by the FERC would also conflict with decades of judicial precedents defining the reach of the Commission’s regulatory *powers* under the NGA by reference to the *jurisdiction* conferred on the Commission under section 1(b). Some objective evidence of congressional intent should be required before construing section 4A in a manner which conflicts with such an unbroken history of judicial precedents.

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 jurisdictional amendment to NGA section 1(b), or express statutory language in section 4A itself extending the section’s

* The author is a Partner with Husch Blackwell LLP. The author wishes to acknowledge the contributions made by Shannon M. Bañaga, an Associate at Husch Blackwell LLP.

jurisdictional reach beyond the scope of the FERC's traditional NGA jurisdiction. Most significantly, the objectively verifiable legislative history of section 4A clearly evidences Congress' intent not to expand the scope of the Commission's jurisdiction under NGA section 4A to entities not subject to the Commission's jurisdiction as delineated in section 1(b) of the Act.

Specifically, simultaneous to the enactment of section 4A, Congress enacted *other* amendments to the NGA, including corresponding modification of the FERC's jurisdiction under section 1(b). This action evidences Congress' understanding that, when enacting amendments to the NGA conferring new *substantive* powers, it is necessary to enact a companion *jurisdictional* amendment to section 1(b) to expand the Commission's NGA jurisdiction commensurate with the expanded substantive authorities delegated to the Commission. It is therefore permissible to infer that the *absence* of an amendment to section 1(b) as a "companion" to the enactment of section 4A was intentional and, further, that the consequences of the lack of an amendment to section 1(b) expanding the Commission's jurisdiction for purposes of section 4A's reference to "any entity," were known to and understood by Congress. Moreover, the absence of an amendment to NGA section 1(b) to expand the Commission's NGA jurisdiction to apply the Commission's new market-manipulation authority under section 4A to "entities" that would otherwise not be subject to the Commission's NGA jurisdiction, evidences a lack of congressional intent to subject such non-jurisdictional entities to the Commission's newly conferred market-manipulation authority under section 4A.

In addition, and even more compelling, simultaneous to the enactment of NGA section 4A, Congress enacted a nearly identical Federal Power Act (FPA) amendment containing jurisdictional language strikingly different from that of section 4A. This legislative history provides compelling evidence that, notwithstanding the apparent breadth of the reference to "any entity," the FERC's authority under section 4A is limited to traditionally jurisdictional "entities."

Finally, in view of the long history of judicial construction of the NGA and the judicially recognized relationship between the Commission's jurisdiction under section 1(b) and the Commission's exercise of statutorily delegated regulatory power under the operative sections of the Act, it is unlikely that Congress would leave a significant expansion of the FERC's jurisdiction to be inferred from a cryptic reference to "any entity" in section 4A, particularly without any explicit statement to that effect or explanation of the intended result anywhere in the legislative history of the amendment.

I. Introduction	473
A. NGA Section 4A	474
B. Summary of Jurisdictional Analysis	475
II. NGA Section 4A	476
A. Statutory Language	476
B. FERC Order No. 670	476
C. The FERC's Interpretation of Section 4A Jurisdiction	477
D. Implications of the FERC's Analysis	477
III. NGA Jurisdictional Analysis.....	478

A.	Overarching Jurisdictional Considerations	478
1.	The FERC Exercises Only Such Power as Has Been Delegated to It by Congress.	478
2.	The NGA is a Limited Grant of Regulatory Power.	478
B.	Jurisdictional Precedents Under the NGA	479
1.	The Statutory Structure of the NGA	479
2.	The Traditional Jurisdiction of the Commission Under Section 1(b) of the NGA	480
3.	Judicial Construction of the Commission’s NGA Jurisdiction ..	481
IV.	The FERC’S Jurisdictional Analysis is Fatally Flawed	487
A.	“Any Entity”	487
B.	“Any Entity” vs. “Natural-Gas Company”	488
C.	“In Connection With”	490
1.	Judicial Precedent Construing the “in connection with” Language Under the NGA Does Not Support the FERC’s Interpretation	490
2.	The FERC’s Attempt to End-Run Judicial Precedents Under the NGA by Resort to Section 10(b) of the Securities Exchange Act is Unavailing	491
D.	“Directly or Indirectly”	494
E.	Protection of Ratepayers	494
F.	The FERC’s Legislative History Analysis	495
V.	The FERC’S Reliance on the “Plain Meaning” Rule is Misplaced	497
A.	Limitations of the “Plain Meaning” Rule	497
B.	Application of the “Plain Meaning” Rule Conflicts with Judicial Precedents Under the NGA	497
C.	Canons of Statutory Construction Other than the “Plain Meaning” Rule Contradict the FERC’s Jurisdictional Ruling	499
VI.	The Legislative History of Section 4A Supports a Jurisdictional Construction Contrary to That Advocated by the FERC	500
A.	Evolution of the Legislative Language of Section 4A	500
B.	Alternatives Rejected by Congress	502
C.	Construing Congressional Intent from Simultaneous Enactment of Other NGA Amendments	502
D.	Construing NGA Section 4A in Light of Congress’ Simultaneous Enactment of a Market-Manipulation Amendment to the FPA	504
VII.	Conclusion	506

I. INTRODUCTION

Companion amendments to the NGA,¹ enacted as part of the Energy Policy Act of 2005 (EPAc 2005),² delegated significant new enforcement powers to the

1. Natural Gas Act, 15 U.S.C. §§ 717-717z (2006).

2. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

FERC. These amendments authorized the FERC to prohibit manipulation of certain federally regulated energy markets,³ and conferred on the FERC substantial new civil penalty authorities.⁴ In view of the substantial civil penalties (up to \$1 million/day) that may be imposed for violating the FERC's regulatory prohibition against "market manipulation"⁵ adopted under the authority of newly enacted NGA section 4A,⁶ it is predictable that issues would arise respecting the scope of the FERC's authority.

Equally predictably, the FERC has asserted an expansive view of its own jurisdiction⁷ that has yet to be judicially affirmed. This article explores the question whether the FERC's jurisdiction (at least for purposes of enforcing regulatory prohibitions against "market manipulation" by "any entity") is limited by the FERC's traditional jurisdiction as defined in section 1(b) of the Act.⁸

A. *NGA Section 4A*

Section 4A confers on the Commission new power to prohibit certain forms of "market manipulation." Specifically, section 4A prohibits "any entity" from engaging in conduct prohibited by the Commission "in connection with" the purchase or sale of natural gas or natural gas transportation services "subject to the jurisdiction of the Commission" under the NGA.⁹ As straight-forward 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.¹⁰ The scope of the authority to prohibit market manipulation conferred by section 4A will turn ultimately on whether the reference to "any entity" in section 4A expands the FERC's NGA jurisdiction (for purposes of section 4A) to "entities" other than those subject to the FERC's "traditional" NGA jurisdiction as set forth in section 1(b) of the Act.

The issue is not purely academic. Under the FERC's expanded civil penalty authority, the FERC is authorized to assess civil penalties of up to \$1,000,000 per violation per day.¹¹ FERC enforcement proceedings have sought

3. *Id.* § 315 (amending 15 U.S.C. § 717c-1).

4. *Id.* § 314(b) (amending 15 U.S.C. § 717(u)).

5. Final Rulemaking, Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4,258 (2006) (to be codified at 18 C.F.R. pt. 1c).

6. 15 U.S.C. § 717c-1.

7. Order No. 670, *Prohibition of Energy Market Manipulation*, III F.E.R.C. STATS & REGS. ¶ 31,202, 71 Fed. Reg. 4,244 (2006) (to be codified at 18 C.F.R. pt. 1(c)).

8. 15 U.S.C. § 717(b).

9. 15 U.S.C. § 717c-1.

10. The FERC's "traditional" jurisdiction under NGA section 1(b) includes the modifications to the FERC's jurisdiction set forth in section 601 of the Natural Gas Policy Act of 1978 (NGPA), Pub. L. 95-621, 92 Stat. 3350, as amended by the Natural Gas Wellhead Decontrol Act of 1989 (Decontrol Act), Pub. L. 101-60, 15 U.S.C. 3431 (2006). In order to avoid circularity problems, for purposes of this article references to the FERC's "traditional" NGA jurisdiction do not include any "expansion" of the FERC's jurisdiction, beyond that set forth in section 1(b), as might arguably be inferred from section 4A's reference to "any entity."

11. 15 U.S.C. § 717t-1.

millions of dollars in civil penalties,¹² including tens of millions of dollars in civil penalties for violation of the Commission's regulatory prohibitions against market manipulation adopted under NGA section 4A.¹³

B. Summary of Jurisdictional Analysis

Analysis of the jurisdictional issue presented by NGA section 4A requires consideration of (i) the language of section 4A itself; (ii) the structural context of the NGA of which section 4A is a part; (iii) the legislative history of the EPC Act 2005 amendment enacting section 4A; and (iv) the congressional purpose and "intent" embodied in the provision so far as they may be discerned from both the statutory language itself and from the objective circumstances surrounding enactment of the legislation.

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) expanding the Commission's jurisdiction,¹⁴ or express statutory language in section 4A itself extending the section's jurisdictional reach beyond the scope of the FERC's traditional NGA jurisdiction.¹⁵ Most significantly, the relevant legislative history of the enactment of section 4A clearly evidences Congress' intent not to expand the scope of the Commission's jurisdiction under NGA section 4A to entities not subject to the Commission's jurisdiction as delineated in section 1(b) of the Act.¹⁶

12. *E.g.*, *Amaranth Advisors L.L.C.*, 120 F.E.R.C. ¶ 61,085 (2007) (\$300 million); *Energy Transfer Partners, L.P.*, 120 F.E.R.C. ¶ 61,086 (2007) (\$82 million).

13. *E.g.*, Order Approving Stipulation and Consent Agreements, *Tenaska Mktg. Ventures*, 126 F.E.R.C. ¶ 61,040 (2009) (\$8,385,000 settlement in six related matters); *Amaranth Advisors L.L.C.*, 128 F.E.R.C. ¶ 61,154 (2009) (\$7.5 million settlement); *Seminole Energy Servs. L.L.C.*, 126 F.E.R.C. ¶ 61,041 (2009) (\$3.75 million demanded); *Nat'l Fuels Mktg.*, 126 F.E.R.C. ¶ 61,042 (2009) (\$4.0 million demanded). The FERC's previous enforcement efforts dealt with FERC rules adopted under other provisions of the NGA. The author is counsel of record in the *Seminole Energy Services* matter.

14. See discussion *infra* at Part VI.C.

15. See discussion *infra* at Part VI.D.

An issue not addressed in this article is whether the term "entity" includes individuals. The FERC has construed the term "entity" to include individuals. Order No. 670, *Prohibition of Energy Market Manipulation*, F.E.R.C. STATS. & REGS. ¶ 31,202 at PP 17-18 (2006); 120 F.E.R.C. ¶ 61,085 at P 49. Even if the jurisdictional issue is resolved as limiting the FERC's power under NGA section 4A to entities subject to the FERC's traditional NGA jurisdiction, it would appear that liability may still extend to individuals under the "central figure" doctrine. *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F. Supp. 871 (S.D. Ala. 1980), *aff'd sub nom. Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App. 1982). Accordingly, the question whether section 4A does or does not cover individuals controlling the actions of traditionally jurisdictional entities may be resolved without resolution of the broader jurisdictional issue and, therefore, is irrelevant to the broader jurisdictional issue addressed in this article.

16. See discussion *infra* at Part VI.D.

II. NGA SECTION 4A

A. *Statutory Language*

Guided by the judicial admonition that the best evidence of congressional intent is the language used by Congress,¹⁷ we begin our analysis by turning to EPCA 2005 and the language of section 4A itself. In pertinent part, section 4A provides:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section [10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))] in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.¹⁸

A substantial focus of this Article is on the language of section 4A itself and the statutory context within which the provision appears.

B. *FERC Order No. 670*

In Order No. 670, the FERC relied on application of the “plain meaning” rule of statutory construction to conclude that “any entity” was to be given a broad meaning, not constrained by the Commission’s traditional NGA jurisdiction,¹⁹ and that the statutory reference means just that, *any* entity, including those otherwise not subject to the Commission’s NGA jurisdiction.²⁰ A well-recognized canon of statutory construction is that words are *ordinarily* to be given their “plain” meaning.²¹ The “plain meaning” canon is tempered, however, by the canon that statutory provisions may not be read in isolation, and the meaning of a statutory provision must be consistent with the structure of the statute of which it is a part.²² Both of these canons are subject to the overarching consideration that the goal of statutory construction is to give effect to the intent of Congress embodied in the legislative enactment.²³

The Commission reasoned that it was sufficient to bring an “entity” within the scope of the Commission’s market-manipulation authority – effectively expanding the Commission’s NGA jurisdiction – if a “nexus” exists between the

17. 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 46.3, 46.5 (7th ed. 2008); *see generally* Am. Tobacco Co. v. Patterson, 456 U.S. 63 (1982); United States v. Rabham, 540 F.3d 344, 348 (5th Cir. 2008); Waggoner v. Gonzales, 488 F.3d 632, 636 (5th Cir. 2007); ECEE, Inc. v. FERC, 611 F.2d 554, 561 (5th Cir. 1980) (“We must grapple with the precise wording of the statute, since the starting point in every case involving construction of a statute is the language itself.” (internal quotations omitted)).

18. 15 U.S.C. § 717c-1.

19. 120 F.E.R.C. ¶ 61,085 at P 49 (2007); 121 F.E.R.C. ¶ 61,224 at P 17 (2007). It is noteworthy that this construction has not been confirmed on judicial review.

20. Order No. 670, *supra* note 7, at P 16.

21. 2A SINGER & SINGER, *supra* note 17, § 46.1 (citing Caminetti v. U.S., 242 U.S. 470 (1917)).

22. *Id.* § 46.5 (citing Waggoner v. Gonzales, 488 F.3d 632, 636 (5th Cir. 2007) (“When interpreting statutes . . . each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole.”)).

23. *Id.* § 46.3; *see generally* Bethlehem Steel Corp. v. U.S., 146 F. Supp. 2d 927 (Ct. Int’l Trade 2001).

entity and a transaction subject to the Commission's NGA jurisdiction.²⁴ The FERC's application of the "plain meaning" rule has the effect of construing section 4A as expanding the Commission's jurisdiction beyond the jurisdictional parameters established by section 1(b).

C. *The FERC's Interpretation of Section 4A Jurisdiction*

In support of its expansive reading of its own jurisdiction under section 4A, the FERC offers a potpourri of rationales, including –

- (a) the import of the word "any" as a modifier of "entity";²⁵
- (b) Congress' choice of "any entity" rather than "natural-gas company" in drafting section 4A;²⁶
- (c) the meaning of the phrase "in connection with,"²⁷ as drawn from the Securities Exchange Act,²⁸ rather than from the construction given to the same term in other sections of the NGA itself;²⁹
- (d) the inclusion of the words "directly or indirectly";³⁰
- (e) section 4A's reference to regulations "in the public interest or for the protection of [natural gas] ratepayers;"³¹ and
- (f) legislative history of questionable relevance,³² including a purported broad remedial purpose of the section.³³

As demonstrated below, serious deficiencies afflict *every element* of the FERC's analysis.³⁴

D. *Implications of the FERC's Analysis*

If the FERC's construction of the scope of the reference to "any entity" is correct, section 4A would extend the FERC's "market manipulation" authority under section 4A to entities not otherwise subject to the FERC's NGA regulatory jurisdiction. This, in turn, would expose otherwise unregulated entities to substantial penalties including most particularly, the recently conferred civil penalty authorities of NGA section 22.

Equally significant, if sustained, the FERC's position would reflect a significant expansion of the FERC's NGA regulatory power, and would represent a significant departure from jurisdictional precedents construing the FERC's traditional regulatory jurisdiction under the NGA. The long-range jurisdictional consequences of such an expansion could have significant

24. Order No. 670, *supra* note 7, at P 16.

25. 121 F.E.R.C. ¶ 61,224 at PP 17, 31.

26. Order No. 670, *supra* note 7, at P 18; 121 F.E.R.C. ¶ 61,224 at PP 17, 28, 31-32.

27. Order No. 670, *supra* note 7, at P 21.

28. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006).

29. Order No. 670, *supra* note 7, at P 22; 121 F.E.R.C. ¶ 61,224 at PP 24-29, 34-45, 59.

30. 121 F.E.R.C. ¶ 61,224 at P 17, 31.

31. *Id.* at P 16 (citing EPAAct of 2005 § 315).

32. *Id.* at P 17-19.

33. *Id.* at PP 26, 35, 37, 40, 48, & n.122.

34. *See* discussion *infra* at Part IV.

implications for the application of NGA regulatory jurisdiction in contexts other than market manipulation.

III. NGA JURISDICTIONAL ANALYSIS

An understanding of NGA jurisdictional precedents is essential to evaluation of the specific arguments proffered by the FERC in support of its expansive construction of its jurisdiction under section 4A. Accordingly, we undertake an analysis of NGA jurisdictional precedents before addressing the merits (or lack thereof) of the FERC's rationales for its expansive jurisdictional reading.

A. *Overarching Jurisdictional Considerations*

As a threshold matter, it is appropriate to consider overarching constitutional and statutory principles which, quite apart from the language and structure of the NGA in general, or section 4A in particular, act as inherent constraints on the exercise of regulatory power by the FERC.

1. The FERC Exercises Only Such Power as Has Been Delegated to It by Congress

"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."³⁵ The D.C. Circuit has pointedly concluded, "if there is no statute conferring authority, [the] FERC has none."³⁶

Thus, the extent of the FERC's authority to prohibit schemes and devices the FERC views as constituting unlawful market manipulation is necessarily limited by the language of section 4A *as written*. The corollary is that the FERC is powerless to expand its regulatory jurisdiction beyond that delegated by Congress, even where the FERC views the need for regulation as compelling. As the Fifth Circuit has observed, "[n]eed for regulation cannot alone create authority to regulate."³⁷ This admonition is particularly important in circumstances such as those present in connection with section 4A, where the FERC considers itself under a substantial mandate to police manipulation of energy markets and has construed its jurisdiction accordingly.

2. The NGA is a Limited Grant of Regulatory Power

Also pertinent to construction of section 4A is the fact that the NGA is a limited grant of regulatory power.³⁸ In enacting the NGA, Congress did not

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

36. *Id.* at 8 (citing *Michigan v. EPA*, 268 F.3d at 1081; *Louisiana 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")).

37. *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 371 (5th Cir. 1997); *see also Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54, 72-73 (D.D.C. 2002) ("The fact that [F.E.R.C.] finds these . . . regulations necessary does not mean that [F.E.R.C.] has been granted the statutory authority to promulgate them . . .").

38. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 322 U.S. 507 (1947) (hereinafter *Panhandle Eastern*).

intend to “occupy the field” or even to delegate to the Commission³⁹ the fullest extent of Congress’ constitutional power under the Commerce Clause.⁴⁰ Instead, in enacting the NGA, Congress acted to plug a regulatory gap (the “*Attleboro* gap”) created by prior Supreme Court decisions.⁴¹ Those decisions constrained the authority of the states to regulate certain transactions having an “interstate component.”⁴² 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, and to the persons engaged in those activities, i.e., “natural-gas companies.”⁴³

B. Jurisdictional Precedents Under the NGA

Determining whether the reference in NGA section 4A to “any entity” is limited to entities subject to the Commission’s “traditional” NGA jurisdiction cannot be made in a vacuum. Rather, analysis of section 4A must be made against the backdrop of nearly seventy years of judicial construction of the scope of the Commission’s jurisdiction under the Act.

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).⁴⁴ This aspect of the NGA is a direct result of Congress’ decision to limit the scope of the Commission’s jurisdiction to plugging the *Attleboro* gap, rather than occupying the field. As

39. The term “Commission” refers to the Federal Power Commission (FPC) prior to October 1, 1977, and to the Federal Energy Regulatory Commission (FERC) commencing October 1, 1977. The Department of Energy Organization Act (DOE Act), Pub. L. No. 95-91 (1977), established the FERC, 42 U.S.C. § 7171(a) (2006), and transferred to the FERC authority under specified sections of the NGA, including sections 4, 5, and 7. 42 U.S.C. § 7172(a)(1)(C) & (D) (2006).

40. FPC v. E. Ohio Gas Co., 338 U.S. 464, 470 (1950); *Panhandle Eastern*, 332 U.S. at 514-16; *Illinois Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498 (1942).

41. *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); *Missouri ex rel. Barrett v. Kan. Natural Gas Co.*, 265 U.S. 298 (1924).

42. See generally *Panhandle Eastern*, 332 U.S. at 518 n.13 (discussing NGA legislative history).

43. See generally 15 U.S.C. § 717(b); FPC v. *Panhandle E. Pipe Line Co.*, 337 U.S. 398, 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 Distrib. Cos. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996) (“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.”). The limited nature of the delegation to the Commission of legislative authority under the NGA is particularly significant when comparisons are attempted between the NGA and federal statutes that lack such limitations, a consideration relevant in applying the construction given to language utilized in section 10(b) of the Securities Exchange Act of 1934 (Securities Exchange Act), 15 U.S.C. 78j(b) (2006), to interpreting identical language in section 4A of the NGA, in lieu of the meaning given the same language in other sections of the NGA.

44. 15 U.S.C. § 717(b). This structural feature of the NGA characterizes the Act and limits the ability to make comparisons between the NGA and statutes lacking such an express jurisdictional limitation, such as section 10(b) of the Securities Exchange Act.

such, section 1(b) is an essential component of the Act, defining the statute's very character.

Moreover, the powers conferred on the 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 upon that power under section 1(b).⁴⁵ Accordingly, it is well established that the substantive authorities conferred under sections 4, 5, and 7 “do not expand the Commission's §1(b) jurisdiction.”⁴⁶

This statutory structure has significant implications for the Commission's exercise of its authority under section 4A of the Act because one of the canons of statutory construction is that statutory provisions may not be read in isolation.⁴⁷ Rather, as previously indicated, the interpretation of a statutory provision – such as the meaning to be accorded to “any entity” in section 4A – must be consistent with the structure of the entire statute.⁴⁸

Congress may be presumed to have been aware of the structure of the NGA, and the jurisdictional limitations of the Act, at the time Congress enacted EAct 2005 adding NGA section 4A.⁴⁹ The structure of the NGA, and in particular the presence of section 1(b) as a free-standing “jurisdiction” section,⁵⁰ is particularly relevant to the extent that recourse to legislative history is required in order to construe properly the reference to “any entity” in section 4A.

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

Prior to its recent amendment by EAct 2005,⁵¹ section 1(b) of the NGA defined the scope of the Commission's NGA jurisdiction⁵² as covering “[t]hree things and three only”:

- (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.”⁵³

Equally important, section 1(b) of the Act expressly excludes certain activities from the Commission's NGA jurisdiction. Specifically, section 1(b)

45. *Shell Oil Co. v. FERC*, 566 F.2d 536 (5th Cir. 1978).

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

47. *2A SINGER & SINGER*, *supra* note 17, § 46.5; *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007).

48. *Id.*

49. See generally *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994); *Texas Coal. of Cities for Util. Issues v. FCC*, 324 F.3d 802, 809 n.4 (5th Cir. 2003); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002); *Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552, 555 (5th Cir. 2000).

50. *ExxonMobil Gas Mktg. Co., v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002) (noting significance of Congress' express delineation of the FERC's jurisdiction under section 1(b) of the NGA).

51. EAct of 2005 § 311(a).

52. For simplicity, this historical discussion 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, 15 U.S.C. § 3431 (2006), excluding from the Commission's NGA jurisdiction certain “first sales” of natural gas and certain interstate transportation of natural gas authorized by the NGPA. However, this simplification has no effect on the validity of the analysis.

53. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947).

provides that “[t]he provisions of this . . . 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.”⁵⁴

Whether, and to what extent, these jurisdictional limitations 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 jurisdictional reach of the Commission’s anti-manipulation power.

3. Judicial Construction of the Commission’s NGA Jurisdiction

The courts, and particularly the U.S. Supreme Court, have played a long and active role in construction of the jurisdictional provisions of the NGA.⁵⁵ One of the most significant jurisdictional rulings under the NGA was the Supreme Court’s landmark decision in *Phillips Petroleum v. Wisconsin*.⁵⁶ In that case, the Supreme Court drew the distinction between the Commission’s jurisdiction under section 1(b) over “sales in interstate commerce of natural gas for resale,”⁵⁷ and the statutory exclusion of production and gathering from the Commission’s NGA jurisdiction under section 1(b).⁵⁸

Today, with the benefit of the perspective that decades of experience with the line drawn by the Court in *Phillips* affords, the distinction drawn in *Phillips* might be viewed as self-evident. That was certainly not the case, however, in the late 1940’s and early 1950’s when the parameters of the Commission’s jurisdictional reach under the NGA were being framed. Long after the *Phillips* decision, the full import of the decision was still being felt.⁵⁹ The lesson of *Phillips* is that one should not assume that anything is obvious where the jurisdiction of the Commission under the NGA is concerned.

54. 15 U.S.C. § 717(b); *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502 (1949) (“Congress in [§] 1(b) of the Act not only prescribed the intended reach of the Commission’s power, *but also specified the areas into which this power was not to extend.*”) (emphasis added).

55. Given the limited number of cases heard by the U.S. Supreme Court, the number of Supreme Court precedents construing the NGA is impressive.

56. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

57. *Id.* at 677.

58. *Id.* at 678 (“production and gathering, in the sense that those terms are used in [§] 1(b), end before the sales by Phillips occur”).

59. *See generally* *Hadson Gas Sys. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996) (“[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.”). Difficulty in applying utility-type regulation to independent producers and the existence of alternative, unregulated intrastate markets for producers’ natural gas supplies lead to shortages of natural gas in interstate markets in the 1970s. *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1255 (D.C. Cir. 1990); *United Distribution Co. v. FERC*, 88 F.3d at 1123 (“Producer price regulation was widely regarded as a failure . . .”). By the late 1970’s, these shortages forced Congress to act. *Associated Gas Distribs.*, 899 F.2d at 1255. In the NGPA, as amended by the Natural Gas Decontrol Act (Decontrol Act), Congress narrowed the Commission’s traditional jurisdiction over “interstate sales-for-resale” by excluding “first sales” from the Commission’s NGA jurisdiction. NGPA, Pub. L. No. 95-621 (1978); Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989); 15 U.S.C. §§ 3301(21) & 3431(a)(1)(A) (2006) (respectively defining “first sale” and excluding “first sales” from the Commission’s jurisdiction under NGA section 1(b)).

Even a cursory review of the court cases dealing with the Commission's exercise of delegated authority discloses a number of 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. These precedents include *FPC v. Panhandle Eastern Pipe Line Co.*,⁶⁰ *Mobil Oil Corp. v. FPC*,⁶¹ *Shell Oil Co. v. FERC*,⁶² *Conoco, Inc. v. FERC*,⁶³ *Altamont Gas Transmission Co. v. FERC*,⁶⁴ *Columbia Gas Transmission Corp. v. FERC*,⁶⁵ *Northern States Power Co. v. FERC*,⁶⁶ *California Independent System Operator Corp. v. FERC*,⁶⁷ and *Bonneville Power Administration v. FERC*.⁶⁸ What these decisions have in common is that in each case the Commission's authority to regulate turned on interpreting the Commission's jurisdiction under the NGA, or its sister statute,⁶⁹ the Federal Power Act (FPA),⁷⁰ rather than the statutory language describing the delegated authority.⁷¹

Thus, in *FPC v. Panhandle Eastern*, the FPC sought to assert jurisdiction over the transfer by an interstate pipeline of leases covering unproved natural gas reserves. The Supreme Court rebuffed the Commission's attempt to expand its jurisdiction as implicit in the delegation to the Commission of specific regulatory authorities under section 4(a), (b) and (c), section 5(a), and section 7(b) and (c):⁷²

To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act⁷³

The Supreme Court refused to "attribute to Congress the intent to grant such far reaching powers as implicit in the Act when [Congress] has endeavored

60. *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498 (1949).

61. *Mobil Oil Corp. v. FPC*, 463 F.2d 256 (D.C. Cir. 1971).

62. *Shell Oil Co. v. FERC*, 566 F.2d 536 (5th Cir. 1978).

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

64. *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239 (D.C. Cir. 1996).

65. *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005).

66. *N. States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999).

67. *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) [hereinafter *Cal. ISO*].

68. *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005).

69. *Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956).

70. FPA, 16 U.S.C. §§ 791-828c (2006).

71. The Supreme Court has expressly recognized that, where the provisions of the NGA and the FPA are identical, the Court has a practice of citing cases under one statute as support for a ruling under the other statute. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 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").

72. *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 507-09 (1949).

73. *Id.* at 509.

to be precise and explicit in defining the limits to the exercise of federal power.”⁷⁴

In *Mobil*, producers challenged the FPC’s ruling in Opinion No. 562⁷⁵ that the royalty provisions of conventional oil and gas leases conferring on the royalty owner a share of the lessee’s proceeds from the sale of natural gas⁷⁶ constituted “sales” of natural gas subject to the Commission’s NGA jurisdiction for purposes of rate regulation. The D.C. Circuit rejected the Commission’s expansive reading of the Act in contravention of the jurisdictional limitations imposed by NGA section 1(b).⁷⁷ Notably, the FPC sought to support its assertion of jurisdiction “on the ground that the purpose of the Act is to protect the ultimate beneficiaries against exploitation by natural gas companies.”⁷⁸ The court observed:

The FPC is to be commended for attempting to further that objective, but it is not sufficient justification upon which to base an expansion of the Act to activities clearly not within its terms. Congress did not give the FPC carte blanche to take whatever action it might consider appropriate in furtherance of this purpose. The FPC is limited by the provision establishing its jurisdiction⁷⁹

In *Shell Oil*, natural gas producers, who undeniably were “natural-gas companies” under the NGA, challenged FPC Order No. 539-B,⁸⁰ imposing a “prudent operator” requirement on producers selling natural gas in interstate commerce for resale. The FERC defended the rule⁸¹ as “an implied condition of the certificates of public convenience and necessity that are required under the [NGA].”⁸² The Fifth Circuit struck down the prudent operator standard as exceeding the Commission’s jurisdiction under the NGA.⁸³ Relying upon the exclusion of “production and gathering” from the Commission’s NGA jurisdiction, the Fifth Circuit stated, “FERC cannot use the power to issue certificates to extend its jurisdiction into the excluded area.”⁸⁴ Continuing, the Fifth Circuit stated, “[t]o hold that the power to issue Order No. 539-B is within

74. *Id.* at 514. Subsequently, in *United Gas Improvement Co. v. Continental Oil Co.*, the Supreme Court held that the FPC had jurisdiction to regulate the terms of the transfer of leases that were in essence “sales” of *proved* reserves of natural gas, notwithstanding the production and gathering exclusion. *United Gas Improvement Co. v. Cont’l Oil Co. (Rayne Field)*, 381 U.S. 392, 399-400 (1965); *Mobil Oil Corp. v. FPC*, 463 F.2d 256, 261(D.C. Cir. 1971) (discussing the background to the *Rayne Field* case and its relationship to *Phillips*). There the D.C. Circuit explained that in *Rayne Field*, “a transaction that was in form a lease of reserves” was “in economic impact the equivalent of ‘conventional sales of natural gas.’” *Id.*

75. *Denman v. J.M. Huber Corp.*, 42 F.P.C. 164 (1969).

76. The court “put to one side” the “special case” of leases under which the landowner takes its share of production “in-kind” and sells the royalty gas for its own account. *Mobil*, 463 F.2d at 260 n.10.

77. *Id.* at 263.

78. *Id.*

79. *Id.*

80. Policy With Respect to Enforcement of Deliverability and Rendition of Natural Gas Service Under Certificated Arrangements, 56 F.P.C. 739 (July 30, 1976), 41 Fed. Reg. 32,883 (Aug. 6, 1976).

81. By the time the FPC Order had reached the Court of Appeals, the FERC had succeeded to the FPC’s jurisdiction under the NGA.

82. *Shell Oil Co. v. FERC*, 566 F. 2d 536, 538 (5th Cir. 1978).

83. *Id.* at 539-40.

84. *Id.* at 539.

the jurisdiction of the FERC would all but eliminate the ‘production or gathering’ exclusion⁸⁵

In *Conoco v. FERC*, the Commission attempted to impose a “default contract” requirement on non-jurisdictional gathering facilities “spun-down” by an interstate pipeline to its affiliate as part of the restructuring process following FERC Order No. 636.⁸⁶ The D.C. Circuit rejected the FERC’s attempt to impose regulatory obligations on companies engaged in production and gathering activities expressly excluded from the FERC’s jurisdiction under NGA section 1(b).⁸⁷

In *Altamont*, the FERC attempted to condition a certificate issued to an interstate pipeline, Pacific Gas Transmission (PGT), on a change in the state-regulated tariff of an affiliate of PGT, Pacific Gas & Electric (PG&E).⁸⁸ PG&E was a Hinshaw pipeline regulated by the California Public Utility Commission (CPUC) and exempt from the FERC’s NGA jurisdiction under Section 1(c).⁸⁹ The FERC contended that a provision in PG&E’s intrastate tariff approved by the CPUC was anticompetitive and unduly discriminatory. The FERC argued that NGA section 7(e) authorizes the Commission “to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require.”⁹⁰ The D.C. Circuit rejected this authority as the basis for requiring a change in PG&E’s state-approved practices, agreeing with PGT’s and CPUC’s argument that the FERC “was attempting to do indirectly what it could not do directly.”⁹¹

In *Columbia Gas*, the FERC had ordered Columbia Gas Transmission Corp. (Columbia) to install and pay for meters on gathering facilities owned and operated by Columbia. The FERC argued that notwithstanding the exclusion of production and gathering facilities from the Commission’s jurisdiction under NGA section 1(b), the Commission had “jurisdiction to compel compliance with [Columbia’s] tariff provision regarding meters on gathering facilities . . . because the tariff was ‘voluntarily filed by the pipeline,’ even if [the] FERC would not otherwise have jurisdiction over such meters.”⁹² The D.C. Circuit rejected the FERC’s reliance on the “filed rate doctrine” as a jurisdictional bootstrap, describing the scope of the FERC’s jurisdictional claim as

85. *Id.* at 540.

86. *Conoco v. FPC*, 90 F.3d 536, 542 (D.C. Cir. 1996) (“If NorAm Field could not negotiate a contract with a customer, it must offer the customer a ‘default contract’ containing terms not inconsistent with those currently offered by independent gatherers in the particular region.”).

87. *Id.* at 552 (“We conclude that the Commission has not identified any source of authority to impose the default contract condition.”).

88. *Altamont Gas Transmission v. FERC*, 92 F.3d 1239 (D.C. Cir. 1996).

89. *Id.* at 1247.

90. *Id.* at 1243.

91. *Id.* at 1248.

92. *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461 (D.C. Cir. 2005) (quoting *Nicole Gas Prod., Ltd.*, 105 F.E.R.C. ¶ 61,371, 62,653 (2003)). Interestingly, initially the Commission had asserted jurisdiction under the “in connection with” language of NGA section 4(a), 15 U.S.C. 717c(a) (2006), but on rehearing “abandoned the ‘in connection with’ rationale.” *Columbia*, 404 F.3d at 461 (citing 105 F.E.R.C. ¶ 61,371, at 62,653).

“brehtaking.”⁹³ In refusing to give deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*⁹⁴ to the FERC’s interpretation of its jurisdiction under the NGA, the court concluded that Congress had unambiguously expressed its intent respecting the FERC’s NGA jurisdiction in section 1(b) and, therefore, the court was not required to defer to the FERC’s interpretation.⁹⁵

Likewise, the courts have reached similar conclusions in cases under the FPA. In *Northern States Power*, the Court of Appeals for the Eighth Circuit described the “fundamental issue” to be “whether [the] FERC may, through its tariff orders, require [Northern States Power] NSP, a public utility, to curtail electrical transmission to wholesale (point-to-point) customers on a comparable basis with its native/retail consumers when it experiences power constraints.”⁹⁶ Although the FERC acknowledged that under the FPA, the FERC cannot permissibly affect state regulation of retail rates and practices,⁹⁷ the FERC contended that where there is a clash between a FERC-approved tariff and state law, the federal tariff must prevail under the Supremacy Clause of the U.S. Constitution.⁹⁸ The Eighth Circuit rejected this contention, concluding that the FERC’s attempt to require NSP to curtail its state-regulated retail service to its native/retail customers on the same basis as NSP curtail federally regulated transmission service had “transgressed [FERC’s] Congressional authority which limits its jurisdiction to interstate transactions.”⁹⁹

In *Cal. ISO*, FERC issued an order purporting to replace the governing board of the California Independent System Operator Corporation (CAISO), chosen in accordance with the requirements of a California statute, with a board dictated by the FERC.¹⁰⁰ The FERC relied on sections 205 and 206 of the FPA as authorizing its action under the Commission’s authority to regulate any “practice . . . affecting [a] rate.”¹⁰¹ In embarking on step one of the *Chevron* analysis, the court observed that “ambiguity is a creature not of definitional possibilities[,] but of statutory context.”¹⁰² The court continued,

The issue is not so much whether the word “practice” is, in some abstract sense, ambiguous, but rather whether, read in context and using the traditional tools of statutory construction, the term “practice” encompasses the procedures used to select CAISO’s board, that is, in the words of *Chevron*, “whether Congress has directly spoken to the precise question at issue.”¹⁰³

Applying traditional tools of statutory construction under *Chevron*, the court’s application of the “plain meaning” rule is instructive, “[t]he word

93. *Id.* at 462.

94. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

95. *Columbia*, 404 F.3d at 461, 463.

96. *N. States Power Co. v. FERC*, 176 F.3d 1090, 1093 (8th Cir. 1999).

97. *Id.*

98. *Id.* at 1095-96.

99. *Id.* at 1096.

100. *Cal. ISO*, 372 F.3d 395, 396 (D.C. Cir. 2004).

101. *Id.* at 398-99.

102. *Id.* at 400 (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

103. *Id.*

'practices' is a word of sufficiently diverse definitions that the only realistic approach to determining Congress's 'plain meaning,' if any, is to regard the word *in its context*."¹⁰⁴

The court observed that the FERC's construction of the word "practice" in FPA section 205(a) would render "superfluous" FPA section 305,¹⁰⁵ conferring on the FERC specific and limited power over corporate governance.¹⁰⁶ The court concluded that "[the] FERC's construction of 'practice' . . . [was] a sufficiently ["poor fit"] with the apparent meaning of the statute that the statute is not ambiguous [on the issue]."¹⁰⁷ Citing *Brown v. Gardner*,¹⁰⁸ the court emphasized that "where 'the text and reasonable inferences from it give a clear answer against the government . . . that . . . is 'the end of the matter'" for purposes of *Chevron* step one.¹⁰⁹ Rejecting the FERC's argument that the FPA conferred on the FERC the authority to regulate anything done by or connected with a regulated utility, the court concluded that the FERC lacked the authority to regulate the governing body of a state-regulated public utility.¹¹⁰

In *Bonneville Power*, the FERC ordered governmental entities and non-public utilities, both exempt from the Commission's FPA jurisdiction, to make refunds related to certain wholesale electric sales made by those entities.¹¹¹ The Court of Appeals for the Ninth Circuit posited the case as

boil[ing] down to whether [the] FERC's authority to order refunds is based on the identities of the sellers subject to the refund order, i.e., public versus non-public utilities, or on the nature of the transactions, i.e., [the] FERC's broad regulatory authority over sale of electric energy for resale in interstate commerce.¹¹²

Concluding that "the text and structure of the FPA are unambiguous," the Ninth Circuit held that:

Chevron deference is not due where [the] FERC's authority to order refunds under § 206(b) is specifically limited to 'public utilities' and no explicit reference to governmental entities is made in § 206(b), as required by § 201(f).¹¹³

. . . .

We conclude that [the] FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities. Our resolution of this question flows from a straightforward analysis of the statute, the Federal Power Act ("FPA"). The text is clear and unambiguous.¹¹⁴

The foregoing cases are not reviewed here for their individual legal significance, but rather as illustrative of the fact that the questions relating to the

104. *Id.* (emphasis added).

105. 16 U.S.C. § 825(d).

106. *Cal. ISO*, 372 F.3d 395, 401 (D.C. Cir. 2004).

107. *Id.*

108. *Brown v. Gardner*, 513 U.S. 115, 120 (1994).

109. *Cal. ISO*, 372 F.3d at 401 (emphasis in original) (quoting *Brown*, 513 U.S. at 120).

110. *Id.* at 404.

111. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 910-11 (9th Cir. 2005).

112. *Id.* at 911.

113. *Id.* at 920 (Contrast with FPA section 222, 16 U.S.C. § 824(v) (2006), see discussion *infra* at Part VI.D).

114. *Id.* at 911.

Commission's exercise of regulatory *power* under the NGA frequently turn on whether the Commission has "jurisdiction" under section 1(b) of the Act, including whether one of the statutory jurisdictional exclusions applies. These cases demonstrate that the jurisdiction of the Commission under the NGA has been, and remains, a contentious issue, sometimes turning on fine points of statutory construction. That historical experience should give pause to assumptions about the scope of the Commission's regulatory jurisdiction under section 4A, and cautions against cursory statutory analysis of the jurisdictional reach of section 4A devoid of context and without regard for the relationship between sections 1(b) and 4A of the Act.

Equally relevant is the fact that the Commission's perception of its own jurisdiction is far from infallible. In the cases discussed above and others, the courts have frequently, and repeatedly, rebuffed attempts by the Commission to expand its jurisdiction beyond that conferred by statute. In each of these decisions, the courts concluded that the language of the statute clearly delineated the FERC's jurisdiction more narrowly than the FERC had asserted. Indeed, in *Cal. ISO*, the court went so far as to describe the FERC's "stretching of the authority granted [to] it" under the FPA as "overreaching."¹¹⁵

IV. THE FERC'S JURISDICTIONAL ANALYSIS IS FATALLY FLAWED

A. "Any Entity"

In Order No. 670, the FERC concluded that "*any* entity" (emphasis added) is a "deliberately inclusive term" not constrained by the Commission's traditional NGA jurisdiction.¹¹⁶ There can be little disagreement with the FERC's contention that the dictionary definition of the word "any" indicates that the use of this modifier broadens Congress' reference to the word "entity" in section 4A.

It is quite another matter, however, to conclude that, *without more*, the use of the modifier "any" overrides decades of judicial construction of the NGA to place an expansive *jurisdictional* construction on the word "entity" that expands the traditional jurisdictional limits of the NGA (and ignores section 1(b) in the process). The FERC's semantic argument supports a broad reading of "entity," but not one so broad that it tears the jurisdictional fabric of the Act. *Absent some compelling evidence of congressional intent*,¹¹⁷ the word "any" should not be given a meaning that yields a conflict between section 4A and the entities to which it applies on the one hand, and the structure of the NGA and the scope of the Commission's NGA jurisdiction expressly set forth in section 1(b) on the other.¹¹⁸

115. *Cal. ISO*, 372 F.3d at 402, 404.

116. Order No. 670, *supra* note 7, at P 18.

117. Such evidence would evidence Congress' intent respecting which provision is to have priority, thereby eliminating the conflict that is fatal both to application of the "plain meaning" rule in this case and to an overly broad reading of "entity" as not bound by the jurisdictional limits of section 1(b). *Cf. Bonneville Power Admin. v. FERC*, 422 F.3d 908, 920 (9th Cir. 2005).

118. Doing so would violate other canons of statutory construction. *See* discussion *infra* Parts V.A., C.

B. “Any Entity” vs. “Natural-Gas Company”

In support of its reading of section 4A as not constrained by the Commission’s traditional NGA jurisdiction, the FERC further cites Congress’s choice of “any entity” in lieu of the NGA-defined term “natural-gas company.”¹¹⁹ Significantly, without any legislative history support, the FERC reasons that Congress’ use of the term “any entity” evidences Congress’ intent not to limit section 4A to traditionally NGA-jurisdictional entities.¹²⁰

The apparent basis for the FERC’s conclusion¹²¹ is the implicit assumption that Congress would have employed the NGA-defined term “natural-gas company,” rather than “any entity,” if Congress had intended to limit the scope of the market-manipulation authority conferred by section 4A to entities that are subject to the Commission’s traditional NGA jurisdiction.¹²² While *ordinarily* this assumption would be valid, as explained below this assumption is most emphatically not applicable in this case.

The amendments to section 1(b) of the NGA made in EAct 2005 render invalid both the implicit assumptions on which the FERC’s analysis is premised, and the inferences the FERC draws from Congress’ choice of “any entity” rather than “natural-gas company” in section 4A. Those amendments also preclude reliance on the congressional choice of language to support application of the “plain meaning” rule to construe the term “any entity” in section 4A as expanding the scope of the FERC’s jurisdiction. These conclusions follow from the fact that, if Congress had referred to “natural-gas company” in section 4A, Congress would not have achieved the result the FERC assumes the NGA-defined term would have yielded.

In fact, contrary to the FERC’s implicit assumption, use of the NGA-defined term “natural-gas company,” in lieu of “any entity,” in section 4A would have limited section 4A to a class of covered entities smaller than the universe of all NGA-jurisdictional entities. This is because the EAct 2005 also amended section 1(b) of the NGA in a manner that undermines the FERC’s assumption, a critical fact overlooked in the FERC’s flawed statutory analysis.

Specifically, the EAct 2005 amended the NGA to confer on the FERC new substantive authorities in connection with the importation and exportation of natural gas.¹²³ To conform the Commission’s statutory jurisdiction under NGA section 1(b) with the grant of these newly conferred statutory powers, the EAct 2005 amended NGA section 1(b) to expand the Commission’s NGA jurisdiction to cover the “importation [and] exportation of natural gas in *foreign*

119. Order No. 670, *supra* note 7, at P 18.

120. The FERC repeated this analysis in 121 F.E.R.C. ¶ 61,224, at P 28.

121. The FERC has neither stated an express basis for this conclusion nor explained the assumptions underlying the FERC’s analysis.

122. The author agrees that such an assumption would *generally* be valid. *Cf.* NGPA § 601(a)(1)(C), as amended by the Decontrol Act, 15 U.S.C. § 3431(a)(1)(C), to exclude persons making NGPA “first sales” from the Commission’s NGA jurisdiction over persons, i.e., natural-gas companies, making interstate “sales-for-resale,” and NGPA section 601(a)(2)(B), 15 U.S.C. § 3431(a)(2)(B), to exclude persons engaged in interstate “transportation of natural gas” authorized under section 311 of the NGPA, 15 U.S.C. § 3371, from the Commission’s NGA jurisdiction over natural-gas companies.

123. EAct of 2005 § 311(a).

commerce”¹²⁴ and to subject to the Commission’s NGA jurisdiction “person[s] engaged in the transportation of natural gas.”¹²⁵ In doing so, however, Congress did not employ the drafting convention of expanding the NGA definition of “natural-gas company” to cover persons engaged in the “importation or exportation of natural gas in foreign commerce.”¹²⁶ As a result, the options available to the legislative draftsman of section 4A were limited. Use of the term “natural-gas company” in lieu of “any entity” was not an option *if* the legislative intent was to apply the authority conferred by section 4A to all entities within the FERC’s NGA jurisdiction as set forth in section 1(b). The fact that all jurisdictional entities *were no longer covered* by the NGA-defined term, foreclosed referring to “natural-gas company” in section 4A to achieve that result.¹²⁷

Thus, the reference to “any entity” in section 4A is *equally consistent* with congressional intent to assure that the Commission’s power under NGA section 4A would apply *at least to all* entities within the Commission’s NGA jurisdiction, as that jurisdiction was expanded by the amendments to NGA section 1(b) made by the EAct 2005. While that “consistency” may not be *dispositive* of the meaning to be accorded to “any entity,” the fact that Congress’ use of the term “natural-gas company,” in lieu of “any entity,” would not have produced the result the FERC assumed, invalidates the FERC’s reliance on Congress’ word choice to support application of the “plain meaning” rule to expand the FERC’s jurisdiction under section 4A.

The logical consequence of the foregoing analysis is that the inference of congressional intent respecting the scope of section 4A drawn by the FERC is not supported by Congress’ reference to “any entity” in lieu of “natural-gas company.” Simply stated, the FERC’s argument, based on Congress’s choice not to use the defined term “natural-gas company,” is precluded by the expansion of the entities subject to the Commission’s section 1(b) jurisdiction through the amendment adopted in EAct section 311(a) without expanding the definition of “natural-gas company.” The FERC’s analysis ignores the existence and substance of the amendments to section 1(b) made by EAct 2005. As a result, the FERC’s analysis of Congress’ word choice is flawed and lends no support to the FERC’s interpretation of the jurisdictional effect of Congress’ use of “any entity” in NGA section 4A.

124. 15 U.S.C. § 717(b) (emphasis added). This amendment was required because the NGA definition of “interstate commerce,” 15 U.S.C. 717(a)(7), expressly excludes foreign commerce. Historically, the FERC’s jurisdiction under the NGA did not apply to import/export transactions which did not also involve an “interstate” component.

125. 15 U.S.C. § 717a(6). This same category of persons engaged in the newly regulated activities involving foreign commerce could also have been brought within the universe of NGA-jurisdictional entities by amending the NGA definition of the term “natural-gas company.” Such an amendment would automatically have had the effect of extending the Commission’s NGA jurisdiction under section 1(b) to “person[s] engaged in the transportation of natural gas “in foreign commerce,” yielding the same jurisdictional result as the amendment to section 1(b) made by section 311(a) of EAct 2005.

126. 15 U.S.C. § 717(b).

127. As previously indicated, reference to “natural-gas company” in section 4A would in fact have *limited* the power to prohibit market manipulation under section 4A to a universe *smaller* than that to which the Commission’s NGA jurisdiction, as modified by section 311(a) of EAct 2005, applied. There is neither textual nor legislative history support for such a result.

C. “In Connection With”

Section 4A of the NGA prohibits “any entity” from engaging in conduct prohibited by the Commission as unlawful market manipulation “in connection with” the purchase or sale of natural gas or natural gas transportation services “subject to the jurisdiction of the Commission” under the NGA.¹²⁸ The primary focus of the FERC’s jurisdictional analysis has been on the effect of the “in connection with” language of section 4A.¹²⁹ Without textual analysis or consideration of relevant legislative history, the FERC reasons that, if the required nexus exists between the FERC’s traditional NGA jurisdiction (as defined by NGA section 1(b)) and the conduct challenged, under the “plain meaning” rule the FERC may impose penalties on “any entity” that engaged in such prohibited conduct, regardless of whether the entity was otherwise subject to the FERC’s traditional NGA jurisdiction.¹³⁰

There is no doubt that the reference to “in connection with” natural gas sales and transportation services “subject to the jurisdiction of the Commission” under the NGA is clearly relevant to the meaning of section 4A in general.¹³¹ The issue, however, is whether the reference is relevant to the construction of “any entity” in particular, and to whether the reference expands the scope of the Commission’s NGA jurisdiction without any corresponding amendment to section 1(b).

The FERC contends that the “in connection with” language supports a “broad” construction of section 4A. As a general proposition, such a contention is unassailable. From this general observation, however, the FERC leaps to the conclusion that “any entity” may be read as not constrained by the jurisdictional limits of section 1(b).¹³² For the reasons given below, this conclusion does not logically follow from the stated premise, and lacks both textual and contextual support.

1. Judicial Precedent Construing the “in connection with” Language Under the NGA Does Not Support the FERC’s Interpretation

Language identical to the “in connection with” language of section 4A is also found in other provisions of the NGA, notably sections 4 and 5. As used in NGA sections 4 and 5, the “in connection with” language has been construed as broadening the regulatory *power* of the Commission, *without expanding the scope of the Commission’s jurisdiction*. Thus, for example, the “in connection with” language has been construed to authorize the Commission to take into account the costs of unregulated production and gathering services in establishing the rates for jurisdictional interstate natural gas transportation

128. Order No. 670, *supra* note 7, at P 21.

129. *Id.* at P 20.

130. *Id.*; see also, *Amaranth Order Denying Rehearing*, 121 F.E.R.C. ¶ 61,224 at P 17. “The language making it unlawful for ‘any entity’ to engage in manipulative conduct in connection with jurisdictional transactions demonstrates Congress’ intent to capture not only natural gas companies [sic] or other jurisdictional companies historically subject to the NGA but rather any individual, corporation, or governmental or non-governmental entity that engages in the prohibited behavior.”

131. *Id.*

132. *Id.* at P 22.

services, without authorizing the Commission to regulate production or gathering services.¹³³

In addition, the “in connection with” language has been construed to authorize the Commission to regulate the rates and charges imposed by interstate pipelines for otherwise unregulated gathering services that are provided “in connection with,” i.e., “bundled with,” jurisdictional interstate natural gas transportation services.¹³⁴ Significantly, however, the limited expansion of rate regulatory authority conferred by the “in connection with” language has been construed as not subjecting the gathering service itself to regulation when provided independently of the jurisdictional activity.¹³⁵

A reading of the “in connection with” language of section 4A consistently with the meaning accorded the same language in other sections of the NGA produces an expansive reading of the *activities* subject to the Commission’s market-manipulation authority under section 4A. That construction of section 4A, however, does not itself expand the scope of the “entities” subject to the Commission’s NGA jurisdiction for purposes of imposing civil penalties.¹³⁶

Moreover, the FERC’s jurisdictional analysis conflicts with decades of judicial construction of the jurisdictional provisions the NGA.¹³⁷ If correct, the FERC’s construction of the statute would be the first instance in which a grant of regulatory power under the Act has been found to expand the Commission’s jurisdiction without an express grant of jurisdiction under section 1(b), and would mark a sharp departure from judicial precedents construing the Commission’s NGA jurisdiction, and in particular decisions holding that the “in connection with” language of NGA sections 4 and 5 does not expand the Commission’s jurisdiction beyond that set forth in section 1(b).¹³⁸

2. The FERC’s Attempt to End-Run Judicial Precedents Under the NGA by Resort to Section 10(b) of the Securities Exchange Act is Unavailing

Notwithstanding the fact that the identical “in connection with” language is also found in other provisions of the NGA, in Order No. 670 the FERC construed the “in connection with” language in section 4A by reference to the use of the phrase in section 10(b) of the Securities Exchange Act.¹³⁹ Based on the meaning given to the “in connection with” language under the Securities Exchange Act,¹⁴⁰ the FERC concludes that the language in NGA section 4A

133. *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 602-03 (1945); *N. Natural Gas Co. Div. of Enron v. FERC*, 929 F.2d 1261 (8th Cir. 1991); *Pub. Util. Comm’n of Colorado v. FERC*, 660 F.2d 821, 826 (1981) (“[T]he Supreme Court on numerous occasions has held that [the] FERC . . . may take into consideration nonjurisdictional items when setting jurisdictional rates.”).

134. *Conoco, Inc. v. FERC*, 90 F.3d 536, 540 (D.C. Cir. 1996).

135. *Id.*; *Shell Oil v. FERC*, 566 F.2d 536 (5th Cir. 1978).

136. Perhaps this is the very reason the FERC chose not to construe the “in connection with” language consistently with the use of the identical phrase in NGA sections 4 and 5.

137. See discussion *infra* Part III.B.3.

138. *Shell Oil*, 566 F.2d at 540; *Conoco*, 90 F.3d at 552-53.

139. Order No. 670, *supra* note 7, at P 20; Securities Exchange Act, 15 U.S.C. §§ 78a-78nn.

140. 15 U.S.C. § 78j.

effectively expands the FERC's NGA jurisdiction beyond that set forth in NGA section 1(b).¹⁴¹

By construing the "in connection with" language by analogy to the Securities Exchange Act (rather than NGA precedent), the FERC apparently believes it has deftly sidestepped the jurisdictional and other statutory construction problems created by construing the jurisdictional consequences of the "in connection with" language of section 4A differently from the construction historically placed on the identical language in NGA sections 4 and 5. The FERC's reliance on the meaning placed on the "in connection with" language in section 10(b) of the Securities Exchange Act, rather than that accorded the same language under sections 4 and 5 of the NGA, is misplaced.

The FERC's analysis of the "in connection with" language of section 4A ignores important structural differences between the NGA and the Securities Exchange Act. In particular, the FERC's reliance on the meaning given to the "in connection with" language under the Securities Exchange Act ignores the critical structural distinction that the Securities Exchange Act lacks a jurisdictional provision equivalent to NGA section 1(b). Where the issue is whether the jurisdictional limits of section 1(b) apply to section 4A, the meaning of NGA section 4A cannot be drawn from the interpretation of even identical language *in a statute which lacks any jurisdictional counterpart to the critical jurisdictional section of the NGA involved*. Thus, the Securities Exchange Act's lack of a jurisdictional counterpart to NGA section 1(b) undermines reliance on the jurisdictional consequences of the "in connection with" language under the Securities Exchange Act as precedent for the jurisdictional consequences of the same language in NGA section 4A. The structural differences between the two Acts cannot be ignored.

In reality, the question whether the "in connection with" language should be construed consistently with the meaning given that language under the NGA, or as that language has been applied under the Securities Exchange Act, is a red herring for two reasons, both based upon the grammatical structure of section 4A.

The first grammatical flaw in the FERC's analysis of the "in connection with" language of section 4A is the unassailable fact that the "in connection with" language relied upon by the FERC to support its expansive reading of "any entity" does not in fact modify the term "any entity." The "in connection with" phrase modifies the phrase "the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission."¹⁴² The "in connection with" phrase may therefore be construed as broadening the *activities* to which the prohibition against use or employment of "any manipulative or deceptive device or contrivance" applies.¹⁴³ This broadening expands the reach of the regulatory prohibition to include sales and transportation activities which are not themselves strictly "jurisdictional," so long as a sufficient nexus exists to a sale or transportation "subject to the

141. Order No. 670, *supra* note 7, at P 22.

142. 15 U.S.C. § 717c-1.

143. *Id.*

jurisdiction of the Commission.”¹⁴⁴ The expanding effect of the “in connection with” language on the *activities* subject to the Commission’s authority to prohibit manipulative practices does not, however, support reading section 4A as expanding the Commission’s NGA jurisdiction to “entities” not otherwise subject to the Commission’s traditional NGA jurisdiction under section 1(b). The FERC’s reliance on the “in connection with” language of NGA section 4A to expand the universe of “entities” subject to the FERC’s civil penalty jurisdiction is grammatically invalid.¹⁴⁵

Substantively, interpretation of section 4A requires that a distinction be recognized between the market-manipulative *activities* to which the FERC’s power applies, and the *entities* which the FERC may penalize for engaging in prohibited conduct. The FERC’s construction of section 4A fails to recognize this textually valid distinction. Because the “in connection with” phrase does not modify “any entity,” the phrase has no relevance to the question whether the application of the FERC’s regulatory power under section 4A to prohibit market manipulation authorizes the FERC to impose sanctions on entities not otherwise subject to the FERC’s NGA jurisdiction. The answer to that question must be found elsewhere than in the “in connection with” phrase, and the meaning given to that phrase is irrelevant in so far as the construction of the term “any entity” is concerned.

Second, in giving the “in connection with” phrase in NGA section 4A the meaning accorded that phrase under section 10(b) of the Securities Exchange Act, rather than the meaning given the identical language under NGA sections 4 and 5, the FERC has ignored the sentence structure of section 4A in a second critical respect. The basis for the FERC’s reliance on the meaning given to “in connection with” under the Securities Exchange Act is the following parenthetical reference in section 4A: “as those terms are used in [section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))].”¹⁴⁶ Grammatically, the parenthetical reference to section 10(b) of the Securities Exchange Act clearly and unambiguously modifies the terms “manipulative,” “deceptive,” “device,” and “contrivance.” Equally important, the parenthetical reference to section 10(b) of the Securities Exchange Act does not modify the phrase “in connection with.”¹⁴⁷ The FERC’s interpretation of section 4A is therefore based on a grammatically flawed reading of the statute.

The parenthetical reference to the Securities Exchange Act provides no basis for construing the phrase “in connection with” differently from the meaning given to the identical phrase in sections 4 and 5 of the NGA. Doing so takes the reference to the Securities Exchange Act out of context, and places a construction on that reference which is not grammatically valid.

144. *Id.*

145. Ultimately it must be recognized that the issues related to the “in connection with” language have no relevance to the more fundamental jurisdictional question whether, in the absence of a companion amendment to NGA section 1(b), section 4A’s reference to “any entity” expanded the FERC’s NGA jurisdiction for purposes imposing sanctions for violation of a prohibition adopted under the authority of section 4A.

146. 15 U.S.C. § 717c-1.

147. Or any other phrase in section 4A for that matter.

D. “Directly or Indirectly”

The FERC also relies on Congress’ use of the phrase “directly or indirectly” to support a broad construction of section 4A under the “plain meaning” rule.¹⁴⁸ As was the case with the FERC’s reliance on the “in connection with” language, the FERC’s reliance on the expansive effects of the phrase “directly or indirectly,” and more particularly the word “indirectly,” ignores the grammatical structure of section 4A and the subject which the phrase “directly or indirectly” modifies.

The “directly or indirectly” language modifies “to use or employ” any manipulative or deceptive device or contrivance. “Directly or indirectly” does not modify “any entity.” Therefore, “directly or indirectly” may properly be construed as supporting an expansive meaning of the activity – use or employment of any manipulative or deceptive device or contrivance – that the FERC may prohibit under section 4A. The phrase has no application, however, to the question whether any prohibition adopted under section 4A may be applied to entities other than those subject to the FERC’s NGA jurisdiction as set forth in section 1(b).

E. Protection of Ratepayers

The final argument articulated by the FERC to support its reliance on the “plain meaning” rule to read section 4A as expanding the Commission’s NGA jurisdiction, is the language of section 4A referring to rules and regulations the Commission may prescribe “as necessary in the public interest or for the protection of natural gas ratepayers.”¹⁴⁹ This is the same boot-strap argument that was rejected in *Mobil Oil v. FPC*.¹⁵⁰

Undoubtedly, the regulatory power conferred by Congress under section 4A is to be administered by adoption of implementing regulations the Commission may prescribe “as necessary in the public interest or for the protection of natural gas ratepayers.”¹⁵¹ This language does not, however, authorize the Commission to extend the scope of the Commission’s delegated powers beyond those conferred by Congress – it is not a proverbial “blank check” to proscribe regulations “in the public interest . . . for the protection of . . . ratepayers” that exceed the bounds of the FERC’s NGA jurisdiction as expressly delineated by section 1(b).¹⁵² The FERC’s argument runs afoul of the Fifth Circuit’s admonition that the “[n]eed for regulation cannot alone create authority to regulate.”¹⁵³ If a congressional delegation of regulatory power to prohibit market manipulation by entities other than those subject to the Commission’s

148. 121 F.E.R.C. ¶ 61,224 at P 17.

149. 15 U.S.C. § 717c-1.

150. *Mobil Oil Corp. v. FPC*, 463 F.2d 256, 263 (D.C. Cir. 1971) (where the Commission’s attempt to justify its rule based upon the purpose of the NGA “to protect the ultimate beneficiaries against exploitation by natural gas companies” was rejected by the D.C. Circuit).

151. 15 U.S.C. § 717c-1.

152. *Id.*; *Mobil Oil*, 463 F.2d at 263.

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

NGA jurisdiction is to be found, it must be found elsewhere than in generic language authorizing the FERC to adopt implementing regulations.

F. The FERC's Legislative History Analysis

The FERC contends that the problems of market manipulation were perceived as “broad,” requiring a “remedy” not constrained by the jurisdictional limits of section 1(b) of the NGA.¹⁵⁴ The FERC then cites snippets of purported “legislative history” which it believes support a construction of “any entity” that is not limited by the traditional jurisdictional bounds of the NGA.¹⁵⁵

It is noteworthy that the FERC's references to “legislative history” are bereft of any reference to report language or legislative debate discussing the jurisdictional issue posited here. In the *Amaranth Order Denying Rehearing*,¹⁵⁶ the FERC cites discussion on the Senate floor of the scope of two different anti-manipulation provisions considered “in May 2005: the ‘Cantwell Amendment,’ which [the FERC contends] sought to add broad anti-manipulation language similar to that of section 10(b) of the Securities Exchange Act and a narrower ‘Domenici Amendment’ that had a specific list of prohibited practices.”¹⁵⁷ The FERC also relies on comments by Senator Jeff Bingaman, Ranking Member of the Senate Committee on Energy and Natural Resources when EPAct 2005 was enacted, on the electric anti-manipulation provision adopted as an amendment to the FPA at the same time NGA section 4A was enacted. Senator Bingaman stated,

We should give [the] FERC this tool and make it clear in the law that all of these deceptive and manipulative practices are illegal. Once we make that clear, we are in a position to hold the [FERC] accountable if, in fact, manipulative or deceptive practices occur in the future.¹⁵⁸

Not only are floor debates among the least reliable forms of legislative history, neither cited reference addresses the specific question whether Congress intended section 4A to expand the Commission's NGA jurisdiction to authorize imposition of penalties on entities not subject to the Commission's “traditional” NGA jurisdiction.¹⁵⁹

The FERC's view of congressional intent fails to address fundamental questions related to the drafting of section 4A. If the purpose of section 4A was indeed to provide a “broad” remedy for a national problem of sweeping concern as the FERC contends:¹⁶⁰

• Why did Congress draft section 4A as an amendment to the NGA at all?

154. 121 F.E.R.C. ¶ 61,224 at P 17.

155. *Id.*

156. *Id.* at P 17-19.

157. *Id.* at P 17 (citing 151 CONG. REC. S7451 (daily ed. June 28, 2005) (Statement of Sen. Cantwell)).

158. 149 CONG REC. S10,182 (daily ed. July 30, 2003) (statement of Sen. Bingaman).

159. As demonstrated *infra* Parts VI.B., C., D., relevant and far more persuasive legislative history contradicts the inferences the FERC draws concerning congressional intent from inconclusive floor statements not directly on point.

160. In support of which the FERC can cite no specific legislative history.

A free-standing legislative enactment, not limited by the jurisdictional constraints of the NGA, would have been more consistent with such a supposed intent.¹⁶¹

• Why did Congress limit the FERC's authority to prohibit market manipulation only to transportation subject to the Commission's jurisdiction under the NGA?

A broad prohibition of market manipulation applicable to all natural gas transportation services subject to the FERC's jurisdiction, i.e., transportation services rendered under NGPA section 311, would have been more consistent with the congressional intent the FERC believes to exist.

• Why did Congress not make the market-manipulation authority applicable to schemes or artifices in connection with any sale or transportation of natural gas?

An even broader prohibition of market manipulation applicable to *all* natural gas transportation services would have been even more consistent with the congressional intent the FERC believes to exist.

• Why exclude intrastate wholesale sales, especially in view of the recognized fact that intrastate sales may affect sales in interstate markets? And why exclude NGPA "first sales," that are beyond the FERC's traditional NGA jurisdiction, yet comprise the bulk of today's wholesale natural gas market?

A broader prohibition of market manipulation applicable to *all sales* of natural gas would have been more consistent with the supposed congressional intent on which the FERC relies to support its reading of section 4A as expanding the FERC's NGA jurisdiction.

The FERC's failure to answer these questions undermines the inferences of congressional intent on which the FERC relies.¹⁶²

Finally, the FERC's selective reliance on snippets of irrelevant legislative history, while ignoring compelling evidence of congressional intent that may be inferred –

(1) from Congress' simultaneous enactment of *other* amendments to the NGA, particularly section 1(b),¹⁶³ and

(2) from Congress' simultaneous adoption of a nearly identical Federal Power Act amendment containing jurisdictional language strikingly different from that of section 4A,¹⁶⁴

negates the inferences of congressional intent the FERC draws.¹⁶⁵

161. As explained *infra* Part VI.B., at least one competing version of the market-manipulation provision was drafted as a free-standing legislative enactment, not constrained by the jurisdictional limits of the NGA. This alternative was not enacted, a relevant fact in any attempt to infer objective congressional intent from legislative history.

162. There is absolutely no legislative history regarding why Congress chose to craft the language one way rather than the other. Any attempt to imply (rather than infer) congressional intent in these areas lacks any documentary support, and is little more than the reading of tea leaves.

163. See discussion *infra* Part VI.C.

164. See discussion *infra* Part VI.D.

165. *In re Sealed Case*, 237 F.3d 657, 669 (D.C. Cir. 2001) ("The limits on the Commission's authority – like that authority itself – are derived from statutory provisions, not from loosely worded fragments extracted

V. THE FERC'S RELIANCE ON THE "PLAIN MEANING" RULE IS MISPLACED

As the foregoing demonstrates, every ground given by the FERC in support of application of the "plain meaning" rule of statutory construction is seriously flawed. The FERC has not justified its expansive reading of the jurisdictional reach of section 4A based upon the purported plain meaning of the term "any entity."

A. *Limitations of the "Plain Meaning" Rule*

Application of the "plain meaning" rule is not without limitation.¹⁶⁶ The "plain meaning" canon of statutory construction assumes that Congress has spoken clearly and unambiguously to the issue in the statutory language.¹⁶⁷ Such an assumption is not appropriate, however, where application of the canon yields a result that is internally inconsistent with other provisions of the same statute. In such instances, the "plain meaning" canon comes head-to-head with a competing rule of statutory construction that statutory language may not be read in isolation and instead must be read within the context of the statute of which the language is a part.¹⁶⁸ This rule is particularly important where a statutory provision has been enacted as an amendment to a pre-existing statutory regime containing express jurisdictional limitations, in which case the existing statute and the amendment must be read together as a harmonious whole.¹⁶⁹

B. *Application of the "Plain Meaning" Rule Conflicts with Judicial Precedents Under the NGA*

In the case of NGA section 4A, application of the "plain meaning" rule to construe "any entity" as broadly conferring on the FERC market-manipulation authority over "entities" outside the Commission's NGA jurisdiction produces a direct conflict with the "plain meaning" of section 1(b). The so-called "plain meaning" of "any entity" would also conflict with numerous judicial precedents defining the reach of the Commission's regulatory *powers* under the Act by reference to the *jurisdiction* conferred on the Commission under section 1(b).¹⁷⁰

It may be assumed that Congress' decision to add the anti-manipulation authority to the NGA was a conscious choice.¹⁷¹ When it enacted section 4A as

from congressional reports and speeches."); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002) ("[S]nippets of legislative history do not a law make.").

166. 2A SINGER & SINGER, *supra* note 17, § 46:1 (citing *Caminetti v. U.S.*, 242 U.S. 470 (1917)).

167. 2A SINGER & SINGER, *supra* note 17, § 45:2; *United States v. Awadallah*, 349 F.3d 42, 51 (2nd Cir. 2003); *see also* *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68-69 (1982).

168. 2A SINGER & SINGER, *supra* note 17, § 46:5; *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007).

169. 1A SINGER & SINGER, *supra* note 17, §§ 22:34-35; *Markham v. Cabell*, 326 U.S. 404, 411 (1945) ("[T]he normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole.").

170. *See* discussion *supra* Part III.B.3.

171. *See* discussion of consideration of House Amendment A002 to H.R. 6 which would have enacted market-manipulation authority as free-standing legislation, unencumbered by the jurisdictional limitations of the NGA, *infra* Part VI.B. *See also* *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994); *Texas Coal. of Cities for Util. Issues v. FCC*, 324 F.3d 802, 809 n.4 (5th Cir. 2003); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002); *Ehlmann v. Kaiser Found. Health Plan of Tex.*, 198 F.3d 552, 555 (5th Cir. 2000).

an amendment to the Act, Congress may also be presumed to have been aware of the jurisdictional limits imposed by section 1(b) and the structure of the NGA on the FERC's exercise of regulatory power under the Act. Under such circumstances, it may be concluded that the "plain meaning" rule is inapplicable where it yields a construction of section 4A that is fundamentally inconsistent with the structure of the NGA, and the meaning given to section 1(b) by a long series of judicial precedents.¹⁷²

The courts have made it abundantly clear that the Commission's exercise of statutory power under the NGA, whether over rates,¹⁷³ commencement of service,¹⁷⁴ abandonment,¹⁷⁵ or imposition of other regulatory obligations,¹⁷⁶ is inextricably linked to whether the activities or persons that are the subject of the exercise of regulatory power fall within the Commission's regulatory jurisdiction under the Act. The exercise of authority under a substantive provision of the Act, e.g., under sections 4 or 5 (relating to rates),¹⁷⁷ section 7(c) (relating to commencement of service),¹⁷⁸ or section 7(b) (relating to abandonment of service),¹⁷⁹ has always been linked to a jurisdictional subject, i.e., to a natural-gas company, to a jurisdictional facility, or to a jurisdictional activity.

The legal powers conferred under the substantive provisions of the Act have consistently been construed as constrained by the jurisdictional limits Congress placed upon that power under section 1(b).¹⁸⁰ Indeed, in *Conoco v. FERC*, the D.C. Circuit Court held that NGA sections 4, 5, and 7 "do not expand the Commission's . . . jurisdiction" beyond that set forth in section 1(b) of the Act.¹⁸¹ There is no logical or statutory reason to reach a different conclusion with respect to section 4A, and no basis exists in legislative history to support a contrary result.

Thus, despite the superficial attraction of the "plain meaning" rule as providing an easy and quick solution to the issue, the conflict that such a result yields, not only internally within the statute itself, but with decades of judicial precedent, argues against application of the rule in this case. Despite the general

172. This is not an instance where a highly technical "inconsistency" is claimed to exist between a newly enacted amendment and an arcane reference in an isolated and relatively insignificant provision of a pre-existing statute. Section 1(b) of the NGA is the heart of the statute, defining the scope of the Commission's jurisdiction for purposes of application of the substantive authorities which follow.

173. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) (regulation of rates charged in interstate sales of natural gas for resale); *Mobil Oil Corp. v. FPC*, 463 F.2d 256 (D.C. Cir. 1971) (regulation of royalty payments).

174. *Shell Oil Co. v. FERC*, 566 F.2d at 536, 538 (5th Cir. 1978) (rejecting defense of rule that it was an "implied condition of the certificates of public convenience and necessity . . . required under" Section 7(c) prior to commencement of service); *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 511 (1949) ("To accept these arguments springing from power to allow interstate service . . . would be an assumption of powers specifically denied the Commission by the words of the Act . . .").

175. *California v. Southland Royalty Co.*, 436 U.S. 519 (1978).

176. *Shell Oil*, 566 F.2d 536 (prudent operator standard); *Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) ("default contract" requirement).

177. 15 U.S.C. §§ 717c-717d.

178. 15 U.S.C. § 717f(c).

179. 15 U.S.C. § 717f(b).

180. *Shell Oil*, 566 F.2d at 539.

181. *Conoco, Inc.*, 90 F.3d 536 (D.C. Cir. 1996).

primacy accorded to the “plain meaning” rule, some objective evidence of congressional intent should be required before construing section 4A in such a manner as to conflict with section 1(b).¹⁸²

Moreover, under *Chevron*, it is well established that “the first step under *Chevron* is to ask whether ‘the intent of Congress is clear.’”¹⁸³ “If Congress’ intent is clear, [courts] must give effect to the unambiguously expressed intent of Congress, regardless of the interpretation pressed by the Commission.”¹⁸⁴ Such is the case with NGA section 4A.¹⁸⁵

C. *Canons of Statutory Construction Other than the “Plain Meaning” Rule Contradict the FERC’s Jurisdictional Ruling*

Having determined that application of the “plain meaning” rule cannot be relied upon as the basis for construction of section 4A, the question becomes how to proceed in pursuit of the ultimate goal of discerning the intent of Congress in order to construe the phrase “any entity” so as to give effect to that expressed intent.¹⁸⁶ Despite the inapplicability of the “plain meaning” rule, it would be wrong to assume that the search for congressional intent should abandon the language of the statute in favor of “secondary sources” of legislative history.¹⁸⁷ Instead, other canons of statutory construction may be applied to the language of the statute itself to assist in inferring congressional intent, and application of established rules of statutory construction to “primary sources” of legislative history, such as those discussed *infra* Parts VI.B-D. below, remain useful tools for ascertaining congressional intent.

When the “plain meaning” rule is not dispositive, one of the useful canons of statutory construction is the rule that specific terms prevail over the general in the same statute, such that a specific statutory provision “trumps” general statutory provisions with respect to the same subject matter.¹⁸⁸ The issue is

182. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 920 (“explicit reference” required before disregarding generally applicable jurisdictional limitations of the FPA).

183. *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461 (D.C. Cir. 2005) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

184. *Bonneville Power Admin.*, 422 F.3d at 914 (internal quotations omitted) (citing *Chevron*, 467 U.S. at 843).

185. In the *Chevron* case, the Supreme Court clearly preserved the role of the judiciary in interpreting federal statutes:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843, n.9 (citations omitted). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-49 (1987).

186. 2A SINGER & SINGER, *supra* note 17, § 46:3; *Bethlehem Steel Corp. v. United States*, 146 F. Supp. 2d 927 (Ct. Int’l Trade 2001).

187. Although this is the course the FERC has opted to follow, the traditional “secondary” sources, i.e., conference reports, congressional committee reports, and Congressional Record transcripts of floor debates in the House and Senate, are virtually devoid of any meaningful guidance. Nevertheless primary sources of congressional intent may still be relevant. See discussion *infra* Parts VI.B., D.

188. *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228-29 (1957); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003) (“As a fundamental rule of statutory interpretation, specific provisions trump general provisions.”).

whether the jurisdictional limits of section 1(b) of the NGA apply to the Commission's exercise of authority under section 4A. In this respect, the "specific" jurisdictional rules are those found in section 1(b) of the Act. With respect to the scope of the Commission's *jurisdiction*, those rules prevail over the general provision, section 4A, dealing with exercise of power to prohibit market manipulation. Under this canon of statutory construction, absent express legislative language in section 4A expanding the Commission's jurisdiction (which would then become the "specific" language prevailing over the general jurisdictional language of section 1(b)),¹⁸⁹ the *express* jurisdictional limits of section 1(b) remain applicable to the entirety of the NGA, including newly enacted section 4A.

VI. THE LEGISLATIVE HISTORY OF SECTION 4A SUPPORTS A JURISDICTIONAL CONSTRUCTION CONTRARY TO THAT ADVOCATED BY THE FERC

Significantly, unlike the FERC's flawed analysis, a proper analysis of the legislative history of section 4A need not rely on "secondary sources" of congressional intent of dubious relevance. Rather, a proper analysis of the legislative history of section 4A focuses on the evolution of the statutory language itself, and the context in which it was enacted, as guides to determining the intent of Congress. Such an analysis demonstrates that the jurisdictional limitations of NGA Section 1(b) constrain the "entities" subject to the FERC's market-manipulation authority under NGA section 4A.

A. *Evolution of the Legislative Language of Section 4A*

In the 109th Congress, the legislative precursor of EAct 2005 was H.R. 6.¹⁹⁰ H.R. 6 was introduced on April 18, 2005, and was considered by the House of Representatives on April 20, 2005, without the benefit of any Committee Report.¹⁹¹ The absence of a House Committee report is not particularly troubling in this case because the bill considered in the House lacked any predecessor to what became section 315 of EAct 2005, adding section 4A to the NGA.¹⁹²

On June 14, 2005, the Senate Energy and Natural Resources Committee reported S. 10,¹⁹³ the Senate counterpart to H.R. 6.¹⁹⁴ As reported to the Senate, section 385 of S. 10 amended the NGA to add a new section 4A, the text of which was identical to that which would ultimately be adopted by the Conferees on H.R. 6, and enacted as section 315 of EAct 2005.¹⁹⁵

With respect to section 385 of S. 10, the Senate Committee Report explains, "[s]ection 385 amends the [NGA] to ban any 'manipulative or deceptive device or contrivance' (as those terms are used in section 10(b) of the Securities

189. Such as that found in FPA § 222, 16 U.S.C. § 824(v). See discussion *infra* Part VI.D.

190. EAct of 2005, H.R. 6, 109th Cong. (2005).

191. 151 CONG. REC. H2192-2366 (2005).

192. H.R. 6, 109th Cong. (2005), reprinted in 151 CONG. REC. H2210-2321 (2005).

193. EAct of 2005, S. 10, 109th Cong. (2005); S. REP. NO. 109-78 (2005).

194. 151 CONG. REC. S6445 (2005).

195. S.10, 109th Cong. § 385 (2005).

Exchange Act of 1934 (15 U.S.C. 78j(b)), in connection with jurisdictional natural gas transactions, that are in violation of FERC rules.”¹⁹⁶

Regrettably, this bare bones description is silent both with respect to the purpose of the provision, and with respect to the jurisdictional effect, if any, of the statutory reference to “any entity.” This report language therefore sheds no real light on congressional intent with respect to the jurisdictional reach of the amendment.¹⁹⁷ The report language provides no basis for inferring congressional intent one way or the other, either to limit the “ban” to persons (or entities) falling within the FERC’s traditional NGA jurisdiction, or to extend the ban to entities beyond the FERC’s traditional NGA jurisdiction.

On June 14, 2005, at the commencement of the Senate debate on H.R. 6, the text of S. 10, as reported by the Senate Energy and Natural Resources Committee, was substituted for the House-passed text of H.R. 6 through Senate Amendment 775.¹⁹⁸ During the ensuing Senate debate, there was little discussion, and no real debate, concerning section 385, the anti-manipulation amendment to the NGA in the Senate bill that would ultimately be enacted as section 315 of EAct 2005.

On June 28, 2005, during Senate floor debate on H.R. 6, Sen. Cantwell described the Senate version of the legislation (S. 10) as containing “a broad statutory ban on all forms of market manipulation in our Nation’s electricity and natural gas markets.”¹⁹⁹ While accurately describing section 385 amending the NGA, the statement is equally applicable to section 1263 of S. 10 amending the FPA (adding what would become FPA section 222, the electricity market-manipulation counterpart to NGA section 4A). This cursory description alone is too thin a reed to support a construction of NGA section 4A as authorizing the application of the newly conferred regulatory authority beyond the traditional jurisdictional bounds of the NGA, especially in view of the express jurisdictional language employed in FPA section 222, and the absence of such language in NGA section 4A.²⁰⁰

In conference, section 385 of S. 10, adding section 4A to the NGA, was adopted unchanged as section 315 of H.R. 6. Regrettably, the cryptic language in the Conference Report to H.R. 6 discussing section 315 of EAct 2005 provides no further illumination of Congress’ intent, particularly with respect to the jurisdictional effect of the reference to “any entity.”²⁰¹

196. S. REP. NO. 109-78, at 30 (2005).

197. *Id.*

198. 151 CONG. REC. S6447 (daily ed. June 14, 2005), 151 CONG. REC. S3561 (daily ed. Apr. 13, 2005).

199. 151 CONG. REC. S7474 (daily ed. June 28, 2005) (statement of Sen. Cantwell).

200. See discussion *infra* at Part VI.D. for complete analysis of the significance of the difference between the jurisdictional language of FPA section 222 and that of NGA section 4A.

201. H.R. REP. NO. 109-190, at 561 (2005) (Conf. Rep.). The Conference Report provides, “[t]he Senate amendment to the text of the bill struck all of the House bill after the enacting clause, and inserted a substitute text. The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for . . . the Senate Amendment.”

B. Alternatives Rejected by Congress

A significant event in the evolution of what became section 315 of H.R. 6, enacting section 4A as an amendment to the NGA, provides valuable illumination of congressional intent. Amendment No. A002²⁰² to H.R. 6²⁰³ was sponsored by the Ranking Minority Member of the House Energy and Commerce Committee, Rep. John D. Dingell. This Amendment was made in order by the “rule” under which the bill was considered on the floor of the House of Representatives.²⁰⁴ Among other things, Amendment A002 would have added a free-standing prohibition²⁰⁵ against “fraudulent and manipulative practices” as section 1283 of H.R. 6.²⁰⁶

Although Amendment A002 was not adopted,²⁰⁷ the text of proposed section 1283 is of particular interest because the free-standing character of the amendment would not have been constrained by the jurisdictional limits of the NGA. By contrast, enacting the prohibition as an amendment to the NGA, as was proposed by section 385 of S. 10, placed the prohibition in a statutory context that *at least* arguably constrains the prohibition by the jurisdictional limits of the NGA.

Rep. Dingell was a senior member of the House-Senate Conference Committee, and a leading advocate among the House conferees for a prohibition on market manipulation. The adoption of the Senate language, rather than the jurisdictionally unambiguous language originally sponsored by Rep. Dingell, evidences the fact that the Conferees were aware of the significance of incorporating the prohibition against market manipulation into an existing statute, with its inherent jurisdictional limits, rather than enacting the prohibition as a free-standing measure. This legislative history is far more relevant to the precise question whether the jurisdictional limitations of section 1(b) of the NGA constrain the entities to which newly enacted NGA section 4A applies than any of the floor statements relied upon by the FERC from legislative debates where the jurisdictional issue was not directly presented or addressed.

C. Construing Congressional Intent from Simultaneous Enactment of Other NGA Amendments

Another well-recognized rule of statutory construction is that congressional intent may be inferred from Congress’ simultaneous enactment of other amendments to the same statute.²⁰⁸ “It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section

202. 151 CONG. REC. H2353 (daily ed. Apr. 20, 2005). Amendment No. A002 proposed multiple unrelated revisions to numerous sections of the bill in a single “basket” amendment.

203. This bill was ultimately enacted as EPAAct 2005, and therefore its legislative history is particularly significant.

204. H.R. Res. 219, 109th Cong. (2005) (enacted).

205. I.e., the provision was not an amendment to any existing statute.

206. 151 CONG. REC. H2329 (daily ed. Apr. 20, 2005); H.R. REP. No. 109-49, at 33-34 (2005) (Conf. Rep.).

207. 151 CONG. REC. H2380 (daily ed. Apr. 20, 2005) (Roll No. 123, 188 yeas, 243 nays, 3 not voting).

208. *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328; *Texas Coal. of Cities for Util. Issues v. FCC*, 324 F.3d 802, 808 n.4 (5th Cir. 2003); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002).

of a statute but omits it in another.”²⁰⁹ Thus, we may consider other amendments to the NGA made simultaneously with enactment of section 4A for guidance in construing section 4A.

As previously indicated, section 311(c) and (d) of EAct 2005 amended NGA section 3 and added new NGA section 3A, respectively.²¹⁰ The amendments expanded the Commission’s regulatory powers regarding siting of LNG facilities for the importation or exportation of natural gas to or from the United States. In connection with these substantive amendments to the NGA, section 311(a) of EAct 2005 also amended NGA section 1(b) to expand the Commission’s NGA jurisdiction to cover:

(a) “the importation and exportation of natural gas in foreign commerce;”²¹¹
and

(b) “persons engaged in such importation or exportation.”²¹²

Thus, the amendment to NGA section 1(b), made by section 311(a) of EAct 2005 evidences, Congress’ understanding that, when enacting amendments to the NGA conferring new *substantive* powers (in this instance over “importation and exportation of natural gas in foreign commerce”) it was necessary to enact a companion *jurisdictional* amendment to section 1(b) to expand the Commission’s NGA jurisdiction commensurate with the expanded substantive authorities delegated to the Commission.²¹³ It is entirely reasonable to infer from EAct 2005’s amendment of NGA section 1(b) that Congress understood that such an amendment was required to assure that the importation and exportation of natural gas in foreign commerce, and the persons engaged in such activities, would be within the Commission’s *jurisdiction* for purposes of exercising the new regulatory *power* over such activities conferred by NGA sections 3(d) and 3A. Further, it is reasonable to infer that by enacting the companion amendment to NGA section 1(b), Congress intended to achieve this very result.

It is likewise permissible to infer that the *absence* of an amendment to section 1(b) as a “companion” to the enactment of section 4A was intentional and, further, that the consequences of the lack of an amendment to section 1(b) expanding the Commission’s jurisdiction for purposes of section 4A’s reference to “any entity,” were known to and understood by Congress. An even stronger inference is that the absence of an amendment to NGA section 1(b) (which would have expanded the Commission’s NGA jurisdiction to apply the Commission’s new market-manipulation authority under section 4A to “entities”

209. *City of Chicago*, 511 U.S. at 338 (quoting *Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993)) (internal quotation marks omitted).

210. EAct of 2005, Pub. L. No. 109-58, § 311(c)-(d), 119 Stat. 594 (2005) (amending NGA section 3, 15 U.S.C. § 717b (2006), and adding new NGA § 3A, 15 U.S.C. § 717b-1 (Supp. V 2005); EAct of 2005, Pub. L. No. 109-58, § 311(a), 119 Stat. 594 (2005) (amending NGA § 1(b), 15 U.S.C. § 717(b) (Supp. V 2005)).

211. EAct of 2005, Pub. L. No. 109-58, § 311(a), 119 Stat. 594 (2005) (amending NGA § 1(b), 15 U.S.C. § 717(b) (Supp. V 2005)).

212. *Id.*

213. Notably, this action was consistent with the modifications to the Commission’s NGA jurisdiction made in the NGPA and the Decontrol Act when a new regulatory structure administered by the FERC was substituted for the NGA regulatory regime. 15 U.S.C. § 3431 (2006).

that would otherwise not be subject to the Commission's NGA jurisdiction), evidences a lack of congressional intent to subject such non-jurisdictional entities to the Commission's newly conferred market-manipulation authority under section 4A.²¹⁴

In short, where Congress intended to expand the FERC's NGA regulatory jurisdiction to reflect the conferring of expanded substantive powers on the Commission, Congress evidenced that it knew how to do so, and did so expressly. That Congress did not do so with respect to section 4A is persuasive evidence that Congress did not intend to extend the jurisdictional reach of the Commission's newly conferred power to prohibit market manipulation to "entities" beyond the reach of the Commission's traditional NGA jurisdiction. The FERC's contrary analysis of congressional intent is fatally deficient in failing to take the contemporaneous NGA amendments into account.²¹⁵

D. Construing NGA Section 4A in Light of Congress' Simultaneous Enactment of a Market-Manipulation Amendment to the FPA

As previously noted, the NGA and FPA have long been recognized as "sister statutes" to be construed in *pari materia*.²¹⁶ Indeed, the Supreme Court has expressly recognized that, where the provisions of the statutes are identical, the Court has a practice of citing cases under one statute as support for a ruling under the other statute.²¹⁷ A corollary to this rule of construction, recognized by the FERC itself,²¹⁸ is that where the statutes differ, the FERC is not free to disregard those differences.²¹⁹ This sanguine rule of construction is applicable here.

Section 1283 of EPAct 2005²²⁰ added a new section 222 to the FPA.²²¹ FPA section 222 was identical to NGA section 4A in most respects, prohibiting "market manipulation" in federally regulated electricity markets.²²² This amendment, and more particularly, differences between the language of NGA section 4A and FPA section 222, provide additional strong evidence of

214. The author recognizes that negative inferences are generally disfavored. This admonition goes to the weight to be accorded the negative inference, and cautions against relying on such an inference alone. Even where the negative inference alone is not compelling, it may nevertheless be persuasive when, as here, it is coupled with other indicia of congressional intent, such as rejection of a free-standing legislative alternative as proposed in House Amendment A002.

215. Indeed, the FERC appears to have been oblivious to the existence and jurisdictional significance of these amendments when it adopted its construction of the jurisdictional reach of section 4A.

216. *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968).

217. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, n.7 (1981).

218. *Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317 at P 3 (2006); Brief for Respondent Federal Energy Regulatory Commission at 46-47 *Energy Transfer Partners, L.P. v. FERC* (2009) (Nos. 08-60730, 60810). ("[B]ecause Congress made amendments to the scope of the FPA penalty provision at the very same time it was amending the NGA to add a penalty provision, presumably it was well aware of the differences of those two provisions.")

219. *Smith v. City of Jackson*, 351 F.3d 183, 190, & n.9 (5th Cir. 2003); 117 F.E.R.C. ¶ 61,317 at P 3.

220. EPAct of 2005, Pub. L. No. 109-58, § 1283, 119 Stat. 979.

221. FPA, 16 U.S.C. § 824(v) (2006).

222. *Id.*

congressional intent not to expand the scope of the Commission's jurisdiction under the NGA to otherwise non-jurisdictional entities.

Both the EAct 2005 amendment to the FPA²²³ and the EAct 2005 amendment to the NGA²²⁴ made it unlawful "for any entity" to use or employ any "manipulative or deceptive device or contrivance" in connection with specified activities subject to the jurisdiction of the Commission.²²⁵ Notably, the following parenthetical language appears immediately after the reference to "any entity" in FPA section 222 "(including any entity described in section 201(f))."²²⁶ The effect of this parenthetical text is unambiguously to expand the Commission's FPA jurisdiction for purposes of its anti-manipulation authority under section 222 beyond the jurisdictional limits otherwise imposed by FPA section 201(f), to include "entities" that would otherwise be beyond the Commission's FPA jurisdiction.²²⁷

Significantly, NGA section 4A contains no comparable parenthetical language expanding the Commission's jurisdiction for purposes of its newly conferred anti-manipulation authority to entities not subject to the jurisdiction of the Commission under section 1(b) of the NGA. This critical *difference* in legislative language constitutes clear and unambiguous evidence of congressional intent not to expand the reach of the Commission's NGA section 4A authority to entities that are beyond the Commission's regulatory jurisdiction *as defined by section 1(b) of the NGA*.

Congress considered the implications of the jurisdictional limitations of the FPA when it conferred on the FERC new powers to prohibit market manipulation in the interstate electricity transmission market, and expressly and unambiguously made that power applicable to "entities" beyond the traditional jurisdictional limitations of the FPA as circumscribed by FPA section 201(f). Because Congress enacted the electricity market-manipulation prohibition in the FPA at the very same time Congress amended the NGA to add a nearly identical natural gas market-manipulation prohibition, it may be presumed that Congress was well aware of the differences between those two provisions.²²⁸ For the same reason, it may be presumed that Congress would have explicitly expanded the scope of the NGA provision beyond the otherwise applicable jurisdictional limitations of the NGA (as it did in the case of the FPA amendment), if Congress

223. EAct of 2005, Pub. L. No. 109-58, § 1283, 119 Stat. 979 (adding FPA § 222, 16 U.S.C. § 824).

224. EAct of 2005, Pub. L. No. 109-58, § 315, 119 Stat. 691 (adding NGA § 4A, 15 U.S.C. § 717c).

225. EAct of 2005, Pub. L. No. 109-58, § 1283, 119 Stat. 979 (adding FPA § 222, 16 U.S.C. § 824), EAct of 2005, Pub. L. No. 109-58, § 315, 119 Stat. 691 (adding NGA § 4A, 15 U.S.C. § 717c).

226. EAct of 2005, Pub. L. No. 109-58, § 1283, 119 Stat. 979.

227. It is worth noting that the inclusion of the parenthetical text in FPA section 222 avoids the inherent statutory conflict presented by construing "any entity" in NGA section 4A as broadly as the phrase is properly construed in FPA section 222.

228. 117 F.E.R.C. ¶ 61,317 at P 3. Brief for Respondent Federal Energy Regulatory Commission at 46-47 Energy Transfer Partners, L.P. v. FERC (2009) (Nos. 08-60730, 60810) ("[B]ecause Congress made amendments to the scope of the FPA penalty provision at the very same time it was amending the NGA to add a penalty provision, presumably it was well aware of the differences of those two provisions."). Texas Coal. of Cities for Util. Issues v. FCC, 324 F.3d 802, 808, n.4 (5th Cir. 2003); Sierra Club v. EPA, 314 F.3d 735, 741 (5th Cir. 2002).

had intended the same result. That Congress did not do so is persuasive objective evidence of congressional intent that cannot be ignored.

Where it is clear Congress is capable of specifying a particular result, such as the jurisdictional expansion set forth in section 222 of the FPA, the absence of similar language specifying the same result in a simultaneously enacted amendment to another statute “was probably intentional.”²²⁹ That presumption clearly is applicable here to resolve the jurisdictional issue presented by the reference to “any entity” in NGA section 4A.²³⁰

Moreover, failing to recognize this salient difference between the otherwise *substantively identical* market-manipulation amendments to the FPA and the NGA would render the parenthetical modifier to the phrase “any entity” in FPA section 222 “surplusage.” Such a result would violate the canon of statutory construction that a statute should be construed so that no clause is rendered “superfluous.”²³¹ Accordingly, NGA section 4A and FPA section 222 should be construed harmoniously together, giving effect to every word and *recognizing the significance of the differences between them*. By contrast, the FERC’s failure to address the critical difference between the language of NGA section 4A and that of FPA section 222, specifically dealing with whether the entities subject to the FERC’s market-manipulation power were or were not limited by the jurisdictional scope of the pre-existing statute, is fatal to the FERC’s legislative and statutory analysis. Because Congress’ intent is clear, “[courts] must give effect to the unambiguously expressed intent of Congress, regardless of the interpretation pressed by the Commission.”²³²

VII. CONCLUSION

On the face of section 4A itself, arguably two diametrically opposed constructions may be placed on the reference to “any entity.” The first, adopted by the FERC, is that the term should be construed literally and without regard to the traditional jurisdictional limitations otherwise imposed on the Commission’s exercise of delegated powers under the NGA. The second, advocated here, is that the term should be construed as implicitly, but necessarily, limited by the statutory context in which the language appears, and the scope of the Commission’s jurisdiction as expressly defined by section 1(b) of the Act.

The first reading is contradicted by canons of statutory construction which prohibit reading statutory language in isolation, and require that statutory language be construed within the context of the entire statute of which the language is a part. This same canon of statutory construction supports the second reading.

The conflict between the first reading and judicial construction historically placed on the jurisdictional provisions of the NGA suggests that, absent some express indicia of congressional intent to expand the scope of the Commission’s

229. Ehlmann v. Kaiser Found. Health Plan of Tex., 198 F.3d 552, 555 (5th Cir. 2000).

230. The FERC’s failure to do so in Order No. 670 renders the FERC’s analysis fatally defective.

231. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Med. Ctr. Pharm. v. Mukasey, 536 F.3d 383, 406 (5th Cir. 2008).

232. Columbia Gas Transmission Corp. v. FERC, 404 F.3d 459, 461 (D.C. Cir. 2005) (quoting Chevron U.S.A. Inc. v. NRDC 467 U.S. 837, 842 (1984) (internal quotations omitted)).

jurisdiction through the reference to “any entity,” no such jurisdictional expansion should be inferred in the face of the express jurisdictional limits set forth in section 1(b) of the Act.²³³

It may even be conceded that neither reading is compelled by the language of section 4A itself. In that case, to determine Congress’ intent we may look for evidence of congressional intent in the legislative history of the statutory language. In fact, in this case there is no better evidence of Congress’ intent than that which may be inferred from Congress’ simultaneous enactment of other legislative amendments.

First, we may look to Congress’ simultaneous enactment of other NGA amendments. Congress adopted an amendment to section 1(b) as a jurisdictional companion to the substantive amendments to NGA sections 3(d) and 3A, but failed to adopt a similar jurisdictional amendment as a companion to section 4A. Where Congress intended to expand the FERC’s NGA regulatory jurisdiction to reflect the conferring of expanded substantive powers, Congress evidenced that it knew how to do, so and did so expressly. That Congress did not do so with respect to section 4A is persuasive evidence that Congress did not intend to extend the jurisdictional reach of the Commission’s newly conferred power to prohibit market manipulation to entities beyond the jurisdictional limits established by section 1(b).

Second, we may also look to Congress’ simultaneous enactment of NGA section 4A and FPA section 222. The *differences* between the similar market-manipulation amendments are compelling evidence of congressional intent. Together the two market-manipulation amendments clearly and unambiguously evidence Congress’ intent to expand the Commission’s FPA jurisdiction beyond the jurisdictional limitations that otherwise would have been imposed by FPA section 201(f), while not expanding the Commission’s NGA jurisdiction beyond entities that are subject to the Commission’s regulatory jurisdiction as defined by section 1(b) of the NGA.

Finally, in view of the long history of judicial construction of the NGA, and the judicially recognized relationship between the Commission’s jurisdiction under section 1(b) and the Commission’s exercise of statutorily delegated, regulatory power under the operative sections of the Act, including sections 4, 5, and 7, it is unlikely that Congress would leave a significant expansion of the FERC’s jurisdiction to be inferred from a cryptic reference to “any entity” in section 4A, particularly without any explicit statement to that effect, or explanation of the intended result anywhere in the legislative history of the NGA amendment.

In *Whitman v. Am. Trucking Ass’n*, the Supreme Court admonished that Congress “does not . . . hide elephants in mouseholes.”²³⁴ If not an elephant,

233. As indicated in the preceding text, this conclusion would not apply if:

- (i) the “plain meaning” of the statutory language itself was not in conflict with the structure of the Act, or with more specific language in other provisions of the Act (notably section 1(b));
- (ii) the statutory language itself evidenced congressional intent to the contrary (as for example by inclusion of express parenthetical language such as that found in FPA section 222); or
- (iii) other credible evidence of contrary congressional intent existed (such as Conference Report language clearly addressing the specific issue).

section 4A's purported expansion of the NGA's jurisdictional scheme is at least a sizeable rhinoceros (another member of the pachyderm family), and its purported hiding place in the term "any entity" is indeed a most unlikely mousehole.

If this result is perceived as a deficiency in the drafting of section 4A, or is found to be unsatisfactory as a policy matter, both concerns are matters for Congress alone to address.²³⁵

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

235. *Atlantic City Elec.*, 295 F.3d 1, 8 (D.C. Cir. 2002); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 371 (5th Cir. 1997); *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002); *Bonneville Power v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005) ("[I]t is not [the judiciary's] task to second guess Congress's judgment as to the breadth of [the] FERC's [jurisdiction]. [The judiciary's] role is a limited one—interpreting the statute as *Congress wrote it*." (emphasis added)).