FERC v. Martin Exploration Management Co.: Proper Price Treatment for Dual-Qualified Natural Gas

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The Natural Gas Policy Act of 1978 (NGPA) reshaped federal regulation of natural gas wellhead prices. The NGPA maintained controls on natural gas wellhead prices but also introduced price deregulation into natural gas markets. This dual system of continued regulation and deregulation of natural gas prices reflected the competing goals of Congress to provide sufficient price incentives for natural gas production while assuring adequate supplies to consumers at reasonable prices.

Congress delegated the administration of the wellhead pricing provisions of the NGPA to the Federal Energy Regulatory Commission (FERC). The Federal Energy Regulatory Commission (FERC) succeeded to the authority of the Federal Power Commission (FPC) in 1977 pursuant to title IV of the Department of Energy Organization Act, 42 U.S.C. §§ 7101, 7171-7177 (1982). This Note will use FERC to refer to agency operations after the passage of the NGPA; the FPC will denote agency operations prior to the enactment of the NGPA.
implementation of the NGPA pricing policies burdened FERC with the task of balancing the statute's contradictory objectives. On the one hand, FERC must preserve price incentives for the continued exploration and development of natural gas reserves. Alternatively, FERC must avoid exposing consumers to inordinate increases in the price of natural gas.

FERC's pricing authority is not absolute. Title I of the NGPA prescribes the maximum lawful ceiling prices that sellers may charge for sales of natural gas in a number of defined gas categories. Specifically, title I identifies eight different categories of natural gas production and sets forth the qualification criteria for each category. Concurrently, section 121 of title I provides a statutory timetable for the gradual elimination of price ceilings for several of the eight categories of natural gas.

The statutory framework of regulated and deregulated price categories, however, is not mutually exclusive. Natural gas may qualify simultaneously under more than one statutory price category. Natural gas qualifying under multiple price-regulated categories or under both a price-deregulated category...
category and a price-controlled category is called "dual-qualified gas." To illustrate the dual-qualified issue, natural gas sold from a well drilled on or after February 19, 1977 may be priced under section 102 of the NGPA, a category deregulated by section 121. That same gas, however, also may qualify for higher ceiling prices under sections 107 and 108 of the NGPA. Natural gas contracts generally respond to the dual-qualification phenomenon by providing two clauses: one that sets the price if the natural gas is regulated and, conversely, one that operates if the natural gas is deregulated.

Section 101(b)(5) of the NGPA represents the statutory statement on the dual-qualified gas question. This section provides that the category resulting in the highest price shall apply. Section 101(b)(5), however, fails to specify whether the deregulated or regulated price constitutes the highest price applicable.

Resolution of the question of which price category, regulated or deregulated, fulfilled the highest price applicable language of the dual-qualification provision of the NGPA fell to FERC. The operation of market pricing mechanisms for natural gas complicated the dual-qualification issue. Contrary to Congress' predictions, deregulation did not result in a progressive increase in natural gas prices. Instead, regulated prices for natural gas surpassed prices for natural gas on the open market. The impact of lower market clearing prices on the dual-qualified issue was clear. Faced with the steady unanticipated decline in market clearing prices for natural gas supplies, producers preferred to qualify gas under the higher, regulated price categories. Alternatively, pipeline purchasers and consumers, eager to

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19. Id. § 3312; see infra note 101 and accompanying text.
20. See supra note 17 and accompanying text.
22. Id. § 3318.
24. 15 U.S.C. § 3311(b)(5). Section 101(b)(5) of the NGPA provides, in its entirety, that:

If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Id.
25. Id.
26. Id.
27. See Order No. 406, supra note 23, at 46,678.
28. Id.
29. Id.
benefit from market conditions, favored the lower market-clearing prices.\(^{30}\)

The advent of the principal deregulation date of January 1, 1985,\(^{31}\) forced FERC to address the dual-qualification issue. Deregulation represented the emergence of conflicts over the proper price treatment for dual-qualified gas. In Order No. 406,\(^{32}\) FERC resolved the question by decontrolling natural gas qualifying under both a regulated price category and a deregulated price category and thus, freed this gas from the price ceiling provisions of the NGPA.\(^{33}\) FERC reasoned that the deregulation of dual-qualified gas complied with the purpose of the NGPA to substitute market forces for price controls.\(^{34}\) The FERC decision effectively lowered the price of dual-qualified gas.

Pipelines and consumers heralded FERC's action to deregulate dual-qualified gas.\(^{35}\) The response of producers, however, differed markedly. Deprived of higher regulated prices for dual-category gas, natural gas producers sought review of FERC's decision in Order No. 406 by filing suit in the United States Court of Appeals for the Tenth Circuit.\(^{36}\) Producer petitioners charged that FERC wrongfully deregulated dual-qualified natural gas.\(^{37}\) Producers argued that the dual-qualification provision of the NGPA presents a producer with an election between a regulated or deregulated price.\(^{38}\)

In *Martin Exploration Management Co. v. FERC*,\(^{39}\) the United States Court of Appeals for the Tenth Circuit adopted the producers' position.\(^{40}\) The Tenth Circuit held that FERC's decision to deregulate and thus lower the price of dual-category gas was contrary to the clear intent of Congress as set forth in the plain language of the NGPA.\(^{41}\) The Tenth Circuit inter-
interpreted the NGPA to permit a producer to elect between a regulated and deregulated price for his dual-qualified gas.\(^4^2\)

The United States Supreme Court reversed.\(^4^3\) In *FERC v. Martin Exploration Management Co.*,\(^4^4\) the Court held that the plain language of the NGPA called for the deregulation of dual-qualified natural gas.\(^4^5\) The Court characterized the decision of the court of appeals to allow producers an election between a deregulated and regulated price for dual-qualified natural gas as "contrary to the whole thrust of the [NGPA]."\(^4^6\) The Supreme Court also observed that by limiting reference exclusively to the deregulated price, its decision would alleviate the potential for price chaos or disuniformity that would result from a dual-price system.\(^4^7\)

This Note will trace the history of federal regulation of natural gas prices. The Note will examine the present statutory formula for natural gas pricing set forth in the NGPA. A review of the dual-qualification provision of the NGPA will demonstrate that neither the statutory language nor the legislative history adequately prescribes the proper price treatment for dual-qualified natural gas. Given the ambiguity in the statutory language and the legislative history, this Note will observe that both FERC and the Tenth Circuit proffered reasonable, albeit variant, interpretations of the dual-qualification issue. An analysis of *FERC v. Martin Exploration Management Co.* will suggest that judicial reluctance to depart from legislative objectives, rather than the plain language of the NGPA, motivated the decision to deregulate dually qualified natural gas. The Note will conclude with a discussion of the impact of *Martin Exploration* on present and future natural gas markets.

I. EARLY NATURAL GAS PRICE REGULATION

A. The Natural Gas Act of 1938

The Natural Gas Act of 1938 (NGA)\(^4^8\) represented the first comprehensive federal regulation of the natural gas industry. The need for a national plan for natural gas legislation stemmed from judicial denial of state power to control the activities of interstate pipelines.\(^4^9\) State attempts to control

\(^{42}\) Id. at 1069.
\(^{44}\) Id. at 1765.
\(^{45}\) Id. at 1768.
\(^{46}\) Id. at 1769.
\(^{47}\) See id. at 1770.
\(^{49}\) For United States Supreme Court opinions holding state regulation of wholesale
interstate pipelines represented unconstitutional restrictions on interstate commerce. The states' inability to regulate the conduct of interstate pipelines, coupled with the pipelines' increasingly monopolistic control over natural gas availability, service, and prices, prompted Congress to enact federal natural gas legislation.\textsuperscript{51}

Congress entrusted the administration of the NGA to the Federal Power Commission (FPC)\textsuperscript{52} and authorized the FPC to establish "just and reasonable" prices for the transportation and sale for resale of natural gas in interstate commerce.\textsuperscript{54} The NGA empowered the FPC to eliminate pipeline monopoly practices through the creation of a national regulatory scheme for the interstate transportation and interstate sale for resale of natural gas.\textsuperscript{55}

The NGA directed the FPC to regulate the interstate pipeline industry in order to assure reasonably priced natural gas to consumers without jeopardizing the reliability or adequacy of supply.\textsuperscript{56}

\begin{itemize}
  \item See supra note 49.
  \item The Federal Trade Commission, in a series of reports, identified several abuses by natural gas pipelines, including monopoly control over consumer prices, and recommended federal regulation of interstate gas prices. See Note, supra note 9, at 106. The Federal Trade Commission reports are mentioned explicitly in § 1(a) of the NGA. See 15 U.S.C. § 717(a) (1982). The reports documented numerous problems existing in the natural gas industry including:
    \begin{itemize}
      \item Waste in production, growing out of excess production capacity in the Southwest (and the lack of field unitization); "unregulated monopoly control" in the Appalachian area; discrimination by pipelines in both the buying and selling of gas; "costly struggles" between competing pipelines; "excessive profits in many natural gas sales between affiliated companies" effected to frustrate state regulation . . .
    \end{itemize}

  \item In 1920, Congress, in the Federal Power Act, created the FPC, the predecessor agency to FERC. 16 U.S.C. § 792 (1982).
  \item Id. Intrastate gas, which is gas produced and consumed within a single state, was not subject to FPC jurisdiction.
  \item See id. § 717. In FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), the Supreme Court stated that "[t]he primary aim of this legislation [the NGA] was to protect consumers against exploitation at the hands of natural gas companies." Id. at 610. Similarly, in Atlantic Refining Co. v. Public Service Comm'n of New York, 360 U.S. 378 (1959), the Supreme Court declared that Congress intended the NGA "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." Id. at 388; see also Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n, 341 U.S. 329, 335-36 (1951); Interstate Natural Gas Co. v. FPC, 331 U.S. 682, 692-93 (1947).
  \item Several federal circuit court opinions hold that the objective of the NGA was to assure adequate, reliable, and reasonably priced supplies of natural gas. See Public Service Comm'n v. FERC, 610 F.2d 439, 442 (6th Cir. 1979); Florida Power & Light Co. v. FERC, 598 F.2d
B. Phillips Petroleum Co. v. Wisconsin: Extending the FPC's Regulatory Authority to Producer Wellhead Sales

The FPC interpreted the NGA to authorize only the regulation of interstate pipeline transportation and sale for resale of natural gas.\(^{57}\) The FPC, however, did not interpret its NGA powers to encompass the regulation of wellhead prices for sales to interstate pipelines by independent producers.\(^{58}\) The FPC's definition of its jurisdictional reach was not ill-founded; the NGA expressly exempted the production or gathering of natural gas.\(^{59}\)

The FPC's narrow view of its NGA powers, although consistent with the original intent of the statute,\(^{60}\) did not survive Supreme Court scrutiny in Phillips Petroleum Co. v. Wisconsin.\(^{61}\) The Court in Phillips overturned the FPC's determination that Phillips Petroleum Company, an independent natural gas producer, was not subject to FPC regulation because the company did not transport natural gas in interstate commerce.\(^{62}\) The Court, relying upon the statutory language and the legislative history,\(^{63}\) rejected the argument that Congress intended to regulate only interstate pipelines under the NGA.\(^{64}\) Instead, the Court interpreted the NGA to require FPC "jurisdiction over the rates of all wholesales of natural gas in interstate commerce,

\(^{57}\) See infra note 58 and accompanying text. Section 1(b) of the NGA defined the statute's scope:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale 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.


The NGA also granted the FPC broad control over additional interstate pipeline activities. Section 7 of the NGA requires FPC approval prior to pipeline entry, expansion, and abandonment of facilities or services. Id. § 717f (1982).

58. Federal Power Commission opinions interpret § 1(b) to extend the FPC's jurisdiction to gas sales at the downstream end of interstate pipelines, but not to sales by producers to interstate pipelines. See In re Phillips Petroleum Co., 10 F.P.C. 246, 276 (1951); see also Morgan & Patterson, supra note 12, at 108.


60. The NGA's legislative history indicates a congressional intent to exempt producer sales to pipelines. See Note, supra note 48, at 716-21. In Permian Basin Area Rate Cases, 390 U.S. 747 (1968), the Supreme Court ultimately acknowledged that the NGA does "not specifically extend to producers or to wellhead sales of natural gas." Id. at 755.


62. Id. at 677.

63. Id.

64. Id. at 681-84.
whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company. 65 The Phillips decision extended the FPC's duty under the NGA to the regulation of producer wellhead sales in addition to the regulation of interstate pipeline sales. 66

Neither the NGA nor the Phillips decision, however, provided the FPC with a pricing formula for producer wellhead sales. 67 Without guidance on the procedures to use to establish producer wellhead prices, the FPC referred to the cost-of-service methodology that it employed to set prices for interstate pipeline sales. 68 Under this approach, the FPC identified historic costs of production for individual producers and allowed prices sufficient to permit each producer to recover his particular costs. 69

The cost-of-service methodology quickly proved unworkable. 70 The FPC experienced little difficulty with the company-by-company application of the cost-of-service formula to the small number of interstate pipelines. By contrast, the vast number of natural gas producers made FPC administration of an individual approach to producer rate determination an unmanageable, if not impossible, task. 71

In 1960, the FPC substituted the cost-of-service approach to individual producer ratemaking with the area rate methodology. 72 Under this procedure, the FPC established a single rate for specific producing regions. 73 Similar to the cost-of-service formula, the FPC based its calculation of area rates on historic average costs of production, rather than on projected future

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65. Id. at 682.
66. Id. at 685.
67. See Morgan & Patterson, supra note 12, at 109.
68. Id.
69. See Breyer & MacAvoy, The Natural Gas Shortage and the Regulation of Natural Gas Producers, 86 Harv. L. Rev. 941, 953 (1973). By using average historic costs, the FPC assumed that the future costs of finding and producing natural gas would not differ markedly from those in the 1950's. See Pierce, Reconstituting the Natural Gas Industry from Wellhead to Burnerip, 9 Energy L.J. 1, 8-9 (1988).
71. See Breyer & MacAvoy, supra note 69, at 953-54; Morgan & Patterson, supra note 12, at 109-10.
72. See Area Rate Proceeding, 24 F.P.C. 1121 (1960). The FPC formally adopted the area rate methodology in 1965. See Area Rate Proceeding, 34 F.P.C. 159 (1965) (Opinion No. 468); Area Rate Proceeding, 34 F.P.C. 1068 (1965) (Opinion No. 468-A); see also Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (upholding the FPC's use of the area rate methodology).
73. See Permian Basin Area Rate Cases, 390 U.S. at 790-813. The area rate approach initially covered only natural gas production by producers. However, the FPC eventually concluded that natural gas production by interstate pipeline also should be eligible for area rate treatment. See Pipeline Production Area Rate Proceeding (Phase I), 42 F.P.C. 738, 752 (1969) (Opinion No. 568).
costs. The historic cost approach, however, failed to provide producers with adequate price incentives because current marginal production costs always exceeded historic average costs. To encourage production activity, the FPC also developed a two-tier rate structure for each producing region: a higher "new gas" rate for natural gas produced from wells drilled after a specified date and a lower "old gas" rate for all remaining natural gas.

Despite the FPC's regulatory manipulations, the historical-cost, two-tiered rate regulation of natural gas prices in the interstate market resulted in less production of interstate gas supplies. By contrast, the unregulated intrastate market, with its open, competitive conditions, experienced all the new supply activities. In a belated attempt to respond to the bifurcation of the natural gas market, the FPC shifted from area ratemaking to national ratemaking in the early 1970's. The national rate methodology covered natural gas produced from wells drilled after January 1, 1973, and applied to both natural gas producers and interstate pipelines. The FPC also promulgated regulations to replace its historic cost approach with an incentive cost approach for natural gas production in interstate markets.

The FPC's policies, however, failed to eliminate the distinction between a regulated interstate market and an unregulated intrastate market. Ultimately, the FPC's implementation of the NGA and its judicial progeny led

74. See Permian Basin Area Rate Cases, 390 U.S. at 813-22.
76. See id. at 13-14.
78. See Note, supra note 77, at 45.
80. See id. National ratemaking yielded closer approximations to the costs of finding and producing natural gas than the FPC's earlier attempts. See Pierce, supra note 69, at 10.
81. The FPC initiated programs establishing production incentive rates to stimulate dedications of natural gas to interstate markets. See Allison, supra note 75, at 4 n.4. For a concise and excellent review of these FPC programs, see Nordhaus, Producer Regulation and the Natural Gas Policy Act of 1978, 19 NAT. RESOURCES J. 829, 837-40 (1979).
82. The FPC regulation of producer wellhead prices contributed significantly to the natural gas shortages of the 1970's. See Allison, supra note 75, at 9; Breyer & MacAvoy, supra note 69, at 965; see also E. ERICKSON, NATURAL GAS AND THE NATURAL GAS POLICY ACT: A PRAGMATIC ANALYSIS 9 (1981) (characterizing the FPC's attempts to ease natural gas shortages in interstate markets by revising upwards interstate ceiling prices as "too tentative and timid"). For discussions of the FPC's various approaches to regulation of producer wellhead sales, see Breyer & MacAvoy, supra note 69, at 952-65; Manning, Federal Regulation of Pricing Provisions in Natural Gas Sales Contracts — From the Phillips Decision to the Natural Gas Policy Act of 1978, 16 HOUS. L. REV. 1081, 1086-90 (1979); Morgan & Patterson, supra note 12, at 109-12.
to an unavoidable dilemma: interstate supplies could not meet the increasing demand for natural gas in interstate markets, and intrastate wellhead prices continued to advance beyond interstate prices.83

II. CURRENT NATURAL GAS PRICE REGULATION

A. The Natural Gas Policy Act of 1978

Congressional recognition that the FPC's administration of NGA regulations, if unaltered, would continue to prohibit the interstate supply of natural gas from meeting consumer demand,84 led to the passage of the Natural Gas Policy Act of 1978.85 In the NGPA, Congress set forth three distinct, but interdependent theories toward natural gas regulation.86 First, to elimi-

83. See E. ERICKSON, supra note 82, at 9. The disparity between intrastate and interstate natural gas prices was significant:

Between 1969 and 1976, interstate prices for new natural gas rose by more than 600 percent, from 19.8 cents per Mcf [million cubic feet] to $1.42 per Mcf. However, during the same period, intrastate prices rose at an even greater rate, from 18 cents per Mcf in 1969 to as high as $2.39 per Mcf in 1977, better than a 1,200 percent increase.


84. Several factors contributed to the serious shortages of natural gas supplies in the early 1970's: increased demand for natural gas in response to federal air quality standards, increased demand for natural gas in the manufacture of petrochemicals and fertilizers, higher oil prices, and decreased production of natural gas as a result of producer rate regulation. See Note, supra note 77, at 44 n. 12.


Statements by individual legislators illustrate congressional recognition that the conference bill represented a compromise between the two conflicting objectives of continuing price controls and immediately deregulating gas prices. Representative Dingell, the floor manager of the Conference Report in the House, remarked that "[b]y steering clear of the extremes presented by these policy alternatives, the Natural Gas Policy Act successfully avoids the deleterious consequences of either policy alternative." 124 CONG. REC. 38,361 (1978). Representative Dingell, fearing that immediate deregulation would impact consumers adversely and secure windfall profits for producers, observed that "[p]hased deregulation as set forth in the conference report avoids both of these objectionable results." Id.

86. See Allison, supra note 75, at 6-7. The three philosophies reflect the debate that surrounded the passage of the NGPA. Id. According to the author, proponents of change to federal natural gas regulation generally espoused three theories: the "blackmail theory," the "depletion theory," and the "free market theory." Id. The blackmail theorists alleged that the
nate the bifurcation of natural gas markets, any producer wellhead pricing scheme must apply to both interstate and intrastate markets. Second, to provide incentives for the production of natural gas, a free market must replace the price-controlled system. Finally, to relieve gas shortages in one market by transferring a gas surplus from another market, impediments to the flow of natural gas between the interstate and intrastate markets must be removed.

B. Natural Gas Pricing Under Title I of the NGPA

In title I of the NGPA, Congress created a dual system of regulation and deregulation of natural gas prices. First, title I applied a new price control structure to all natural gas, regardless of its status as a product of interstate or intrastate commerce. The objective of the price control provisions was to extend federal natural gas regulation into the intrastate market. The "blackmail" theorists felt this solution would convince withholding producers that they had nothing to gain by withholding gas supplies. New gas supplies would come forth which the interstate market could acquire without engaging in bidding contests with companies in the intrastate market.

For "depletion" theorists, the goal was to extend federal allocation programs to the intrastate markets so that the nation's dwindling gas supplies would be shared on the basis of need rather than on a willingness to pay. Not only would this approach give the interstate market a greater share of the nation's gas supplies, it also would prevent petroleum companies from receiving large scarcity rents.

Proponents of both theories sponsored the same natural gas policy approach, which was to extend federal natural gas regulation into the intrastate market. The "blackmail" theorists felt this solution would convince withholding producers that they had nothing to gain by withholding gas supplies. New gas supplies would come forth which the interstate market could acquire without engaging in bidding contests with companies in the intrastate market.

For "depletion" theorists, the goal was to extend federal allocation programs to the intrastate markets so that the nation's dwindling gas supplies would be shared on the basis of need rather than on a willingness to pay. Not only would this approach give the interstate market a greater share of the nation's gas supplies, it also would prevent petroleum companies from receiving large scarcity rents.

Id. (footnotes omitted). Alternatively, free market proponents attributed natural gas shortages to regulatory shortcomings, not to fraud or depletion by the producing industry. Id. Free market theorists advocated the deregulation of natural gas prices in order to "provide producers with adequate production incentives and induce consumers to use energy more efficiently." Id. at 7-8 (footnote omitted).

87. See 15 U.S.C. §§ 3315(b)(3)(A), 3316(b) (1982) (regulating sales of gas under existing intrastate contracts); id. § 3315(b)(3)(D) (providing for uniform treatment of new natural gas whether interstate or intrastate). The NGPA establishes ceiling prices on first sales of natural gas regardless of whether the sale occurs in intrastate or interstate commerce. See id. §§ 3315(b)(3), 3316(b).

88. See id. §§ 3312, 3313, 3317, 3318. Interestingly, the natural gas ceiling price provisions of the NGPA integrate the production incentive objectives of the FPC's pricing policies. See e.g., Allison, supra note 75, at 4-5.

89. See supra note 87 and accompanying text. For a brief summary of the NGPA provisions facilitating freer gas flows between the interstate and intrastate market, see Allison, supra note 75, at 38.

90. 15 U.S.C. §§ 3312-3319 (1982); see also supra note 14 and accompanying text.

91. See supra note 87 and accompanying text.
two-fold: to eliminate the price disparity between interstate and intrastate gas\(^2\) and to protect consumers from increases in natural gas prices.\(^3\) Second, title I introduced an element of deregulation into an industry whose buying and selling practices represented a tradition of strict wellhead price ceilings.\(^4\) The phased deregulation scheme provided incentives to producers to explore for and develop new gas supplies, thereby alleviating natural gas shortages.\(^5\) Title I reconciled the competing objectives of maintaining adequate supplies at reasonable prices to consumers by gradually deregulating new and hard-to-produce gas while retaining price controls on old, low-cost gas.\(^6\)

The production incentive response to natural gas shortages is provided in sections 102,\(^7\) 103,\(^8\) 107,\(^9\) and 108\(^10\) of the NGPA. Section 102 sets the price ceiling for new natural gas and gas produced from the Outer Continental Shelf (OCS).\(^11\) Section 103 establishes the ceiling price for new, onshore production wells.\(^12\) Section 107 provides incentive pricing for high-cost

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92. Congress created a single national market for natural gas to eliminate "the interstate-intrastate distinction . . . together with the resulting distorting effect on both production and distribution." S. REP. No. 436, supra note 83, at 21.

93. See 15 U.S.C. §§ 3314-3315 (1982). The lowest ceiling prices are imposed on "old" gas. Id. Continuation of price controls on lower cost gas serves two objectives. It permits interstate pipelines to keep the average cost of gas low despite the addition of expensive new or deregulated gas purchases, and provides residential and commercial consumers with an interim buffer against market-clearing prices. See Morgan & Patterson, supra note 12, at 122.

94. See infra notes 97-104 and accompanying text.


98. Id. § 3313.

99. Id. § 3317.

100. Id. § 3318.

101. Id. § 3312. To qualify for the § 102 price, natural gas must be produced from a new Outer Continental Shelf lease (entered into on or after April 20, 1977), a new onshore reservoir (discovered on or after July 27, 1976), or a new onshore well located 2.5 miles or more from the nearest marker well or located at a depth of at least 1,000 feet below that marker well. Id. § 3312(c)(1). The § 102 category represents new production and therefore receives favorable price treatment as a production incentive.

102. Id. § 3313. To qualify for the § 103 price, natural gas must be produced from a new, onshore production well for which the surface drilling commenced on or after February 19,
natural gas. Similarly, section 108 sets special pricing for stripper wells.

Balanced against the production incentive policy is the consumer price protection policy embodied in sections 104, 105, 106, 107, and 109 of the NGPA. Section 104 sets the ceiling price for natural gas supplies committed or dedicated to interstate commerce prior to the enactment of the NGPA. Section 105 prescribes the price for gas sales under existing intrastate contracts. Section 106 establishes the price ceiling for gas sales under rollover contracts. Section 109 is a catchall, including all natural gas not covered by any maximum lawful pricing scheme under any other section.

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103. Id. § 3317. To qualify for the § 107 “high cost gas” price, natural gas must be produced from a well on which the surface drilling commenced on or after February 19, 1977, and is produced from a completion location at a depth in excess of 15,000 feet; produced from geopressure brine; occluded gas produced from coal seams; produced from Devonian shale; or produced under conditions presenting extraordinary risks or costs as determined by FERC. Id. § 3317(c).

104. Id. § 3318. To qualify for the § 108 “stripper well gas” price, natural gas must be produced from a well that, at its maximum efficient rate of flow, did not exceed an average of 60 million cubic feet per production day. Id. § 3318(b)(1). Natural gas may retain its stripper well status if the production exceeds an average of 60 million cubic feet per production day during any 90-day period as a result of recognized enhanced recovery techniques. Id. § 3318(b)(2).

105. Id. § 3314.

106. Id. § 3315.

107. Id. § 3316.

108. Id. § 3319.

109. Id. § 3314. Section 104 applies to natural gas committed or dedicated to interstate commerce on November 8, 1978, the date of the enactment of the NGPA, and subject to a just and reasonable rate under the NGA. Id. § 3314(a). Section 104 prices are lower than the prices provided in the other pricing sections of the NGPA. The NGPA, however, authorizes FERC to set higher ceiling prices provided that the higher price is just and reasonable. Id. § 3314(b)(2).

110. Id. § 3315. To qualify for the § 105 price, natural gas must be sold under an existing contract or successor to that contract, and must not have been “committed or dedicated to interstate commerce on November 8, 1978.” Id. § 3315(a).

111. Id. § 3316. To qualify for the § 106 price, natural gas must be subject to either an interstate or intrastate rollover contract. Id. § 3316(a)-(b). The term “rollover contract” refers to contracts entered into on or after the date of the enactment of the NGPA, “for the first sale of natural gas that was previously subject to an existing contract which expired at the end of a fixed term . . . specified by the provisions of such existing contract, as such contract was in effect on the date of the enactment of [the NGPA].” Id. § 3301(12).

112. Id. § 3319. To qualify for the § 109 price, natural gas must be produced from a new well that does not qualify for a higher ceiling price; committed or dedicated to interstate commerce on the date of the enactment of the NGPA and not subject to a just and reasonable NGA rate; neither subject to an existing contract nor committed or dedicated to interstate commerce on November 8, 1978; or produced from the Prudhoe Bay Unit on the North Slope.
The eight categories of ceiling prices limit the amount that a producer can charge for his natural gas. The price ceilings, however, are not absolute. Section 121 of the NGPA introduced a phased scheme for the removal of the price ceilings for some of the eight categories. The phased deregulation scheme of section 121 reflected the expectation of the statute's drafters that market prices for natural gas always would exceed statutory ceiling prices. To forestall the impact of higher deregulated prices, Congress expressly mandated in section 121 that designated statutory categories of natural gas, including sections 102 and 103 gas, would be deregulated on January 1, 1985, and July 1, 1987.

III. THE QUESTION OF DUAL-QUALIFIED NATURAL GAS UNDER THE NGPA

A. The Statutory Framework

The eight price categories of natural gas specified in title I of the NGPA are not mutually exclusive. Under the NGPA, substantial quantities of natural gas may be “dual-qualified.” Dual-qualification allows natural gas to qualify simultaneously under more than one statutory pricing provision. The overlap can occur between multiple price-regulated categories as well as between categories free from maximum lawful ceiling prices and categories subject to ceiling prices. To illustrate the overlap between regulated and deregulated categories, natural gas sold from a well drilled on or after February 19, 1977 may be priced under section 102, a category deregulated by section 121. The same gas, however, may qualify simultaneously for higher ceiling prices under section 107(c) or 108 categories denoting hard-to-produce natural gas. Section 101(b)(5) of the NGPA is the statutory provision that determines which of the price categories should apply. Under section 101(b)(5), “the provision which could result in the highest price shall
be applicable."

Congress provided minimal legislative guidance on the precise operation of the dual-qualification provision. The conference report\textsuperscript{120} reiterates the statutory directive to award the highest price treatment to dual-qualified gas. The conference report provides that if natural gas is dual-qualified, "the provisions that permit the seller to obtain the highest price applies."\textsuperscript{121} The explanatory statement,\textsuperscript{122} prepared subsequent to the filing of the conference report in the Senate, also offered guidance on the precise operation of section 101(b)(5). The explanatory statement advised that section 101(b)(5) "is intended to facilitate resolution of which ceiling price may apply if more than one ceiling price rule appears applicable."\textsuperscript{123}

Congressional floor statements do not introduce additional insight into the operation of the dual-qualification provision. Indeed, the foremost congressional leaders on natural gas policy provided perfunctory assessments of the operation of the dual-qualification provision of the NGPA. Representative Dingell, Chairman of the House Energy and Commerce Committee, reasoned that "[i]t is up to the producer to apply for whatever [price] designation he determines is most likely to be of greatest benefit to him."\textsuperscript{124} Senator Jackson, Chairman of the Senate Energy and Natural Resources Committee, explained that section 101(b)(5) allows a producer to "claim or apply for the highest price to which he is entitled."\textsuperscript{125}

Congressional debate over statutory provisions reveals contradictory viewpoints on the proper price treatment for dual-qualified natural gas. The statements of Senator Bartlett illustrate congressional uncertainty over the appropriate price status for section 108 stripper well natural gas. Senator Bartlett suggested that stripper well natural gas is deregulated, but "only to the extent that such wells are otherwise new [section 102] wells and would be deregulated anyway."\textsuperscript{126} With this remark, Senator Bartlett extended deregulated price treatment to section 108 gas that also qualified under section 102. However, Senator Bartlett's commitment to the deregulation of

\footnotesize{\textsuperscript{119} 15 U.S.C. § 3311(b)(5); see also supra note 24.}
\footnotesize{\textsuperscript{122} See 124 Cong. Rec. 38,362-67 (1978). Representative Dingell, the floor manager of the conference report in the House, and Representatives Staggers, Ashley, Eckhardt, and Wilson prepared an explanatory statement to respond to "questions . . . regarding the meaning of certain sections." 124 Cong. Rec. 38,362 (1978).}
\footnotesize{\textsuperscript{123} 124 Cong. Rec. 38,363 (1978).}
\footnotesize{\textsuperscript{124} Id. (statement of Rep. Dingell).}
\footnotesize{\textsuperscript{125} 124 Cong. Rec. 29,109 (1978) (statement of Sen. Jackson).}
\footnotesize{\textsuperscript{126} 124 Cong. Rec. 31,387 (1978) (statement of Sen. Bartlett).}
stripper well gas is confusing. He also asserted that the NGPA will maintain price controls "forever" on several categories of natural gas, including stripper well natural gas.\(^{127}\)

**B. Administrative Deregulation of Dual-Qualified Gas**

With the advent of the deregulation date of January 1, 1985,\(^{128}\) FERC issued a notice of proposed rulemaking\(^{129}\) to commence its consideration of the proper legal treatment of gas that qualifies for both a regulated and deregulated price. FERC proposed deregulating all dual-qualified gas, regardless of whether the gas also qualified for a regulated price under the NGPA.\(^{130}\) FERC asserted that this result was consistent with the statutory goal of the NGPA to substitute market forces for price regulation.\(^{131}\) Significantly, FERC also observed that the dual-qualification provision of the NGPA "arguably" provided a producer with an option to remain price-regulated if the regulated ceiling price for his natural gas exceeded the deregulated market price.\(^{132}\)

Natural gas producers, pipelines, consumer groups, and other interested parties submitted comments on the proposed rule.\(^{133}\) The pipeline industry wholeheartedly supported FERC’s decision to deregulate dual-qualified gas.\(^{134}\) Pipelines generally argued that by allowing producers an election between regulated and deregulated prices, FERC would defeat the congressional movement toward substituting government control with market

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128. See supra note 17.
130. Id. at 36,401.
131. Id.
132. Id.
133. Id.
134. FERC received approximately 100 comments on the proposed rule. Order No. 406, supra note 23, at 46,875. Producers comprised 45% of the comments, pipelines comprised 25%, and utilities, local distribution companies, and consumers comprised 30%. Id. FERC did not hold a hearing on the rulemaking; instead, FERC convened an informal public conference on October 11, 1984.
134. See generally Comments of United Gas Pipe Line Company and United Texas Transmission Company in Docket No. RM84-14-000, Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act, at 3 [hereinafter United Companies Comments] ("United and United Texas agree that gas which qualifies for a deregulated category and for a regulated category is price deregulated.")]
forces. Alternatively, producers argued for a choice, recommending that FERC interpret section 101(b)(5) to allow a seller the option to select between a deregulated or regulated price. Producers asserted that if FERC failed to modify its proposal to deregulate dual-qualified gas, production of hard-to-produce natural gas would become uneconomical.

After reviewing the comments, FERC issued Order No. 406. The order deregulated natural gas qualifying for both a regulated price and a deregulated price. FERC's decision effectively required the sale of dual-qualified gas at market clearing prices, regardless of whether the gas qualified for a higher statutory ceiling price.

FERC substantiated the deregulation of dual-qualified gas on its reading of section 121 of the NGPA. FERC interpreted section 121 to represent a

135. Id. at 5. The pipelines agreed with FERC that producers do not have a right to choose between a regulated or unregulated price. Id. at 3.

136. See generally Comments of Damson Oil Corporation in Docket No. RM84-14-000, Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act, at 6 [hereinafter Damson Oil Comments] ("Damson urges the Commission not to require producers to take the deregulated price, but continue the option . . . to charge or collect either the incentive or the deregulated price.") (emphasis in original). Producers, particularly independent producers who primarily produced incentive-priced gas under §§ 107(c)(5) (tight sands formation gas) and 108 (stripper well gas), recommended that FERC correct its initial interpretation of § 101(b)(5) in order to permit a producer a choice between a regulated and a deregulated price for dual-qualified gas. See id. The Independent Oil and Gas Association (IOGA), a group of small independent producers in the State of West Virginia, argued that "[s]ection 101(b)(5) does not authorize the Commission to determine that gas which does qualify for a deregulated category does not also qualify for a regulated category." Oral Comments of the Independent Oil and Gas Association in Docket No. RM84-14-000, Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act, at 2 [hereinafter IOGA Comments]. IOGA contended that such a construction is directly opposite to the plain language of the statute. Id.

137. See generally Comments of Barrett Energy Company et al. in Docket No. RM84-14-000, Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act, at 2 ("[T]he Commission's proposed rule will have an adverse effect on Barrett's operations and those of other similarly situated small independent producers who develop NGPA section 107(c)(5) gas reserves in tight sands formations."). Producers contended that without the higher incentive price, exploration and development of hard-to-produce gas under §§ 107(c)(5) and 108 would no longer be profitable and thus, would be abandoned. See Damson Oil Comments, supra note 136, at 2. Producers argued that this result would not only lead to severe economic hardship in the producing community, but also would deprive the nation of substantial natural gas reserves. See id. at 3-4.


139. Id. at 46,875. Order No. 406 expressly provided that:

First sales of natural gas that is deregulated natural gas . . . is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

congressional mandate to phase from regulated ceiling prices to market clearing prices.  

The pronouncement in section 121 that maximum lawful prices for certain gas categories "shall . . . cease to apply effective January 1, 1985," persuaded FERC to conclude that deregulation is statutorily required.  

This interpretation advanced by FERC supports the deregulation of gas that qualifies under section 107(c)(5) or 108 and section 102 of the NGPA.  

FERC reasoned that the statutory intent to substitute market forces for regulated prices supplants the statute's objective to increase natural gas supplies.  

Armed with this understanding of the hierarchy of statutory goals of the NGPA, FERC's decision to prohibit producers from opting out of deregulation comporting fully with the statutory purpose of the NGPA to phase from price regulation to market clearing prices.  

FERC also examined the statutory statement on dual-qualification set forth in section 101(b)(5) of the NGPA. While FERC characterized section

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141. Id.  
143. Order No. 406, supra note 23, at 46,878. Interestingly, producers advocated the deregulation of dually qualified gas in an earlier FERC proceeding when market forces would have produced higher prices for gas. See Interim Rule Covering High-Cost Natural Gas Produced from Tight Formations, 45 Fed. Reg. 13,414 (1980) [hereinafter Interim Rule on Tight Formations]. FERC repeatedly referred to this alleged dramatic shift by producers from a pro-deregulation to a pro-regulation stance. See Petition for Writ of Certiorari to the United States Court of Appeals at 9 n.13, FERC v. Martin Exploration Management Co., 108 S. Ct. 1765 (1988) (No. 87-363) [hereinafter Petition for Writ of Certiorari], Brief for Respondent FERC on Petition for Review at 27 n.11, Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (10th Cir.) (No. 84-2756), rev'd, 108 S. Ct. 1765 (1988); Order No. 406, supra note 23, at 46,878 n.10. The interim rule prescribed guidelines for the designation of high-cost natural gas and established the maximum lawful price necessary to encourage the production of this gas. See Interim Rule on Tight Formations, supra. In their comments on the interim rule, several producers advocated the deregulation of dual-qualified gas whenever one of the price categories under which the gas qualifies constituted a deregulated price, irrespective of which price, the controlled or decontrolled, is higher. See Joint Comments of Indicated Producers in High-Cost Natural Gas Produced from Tight Formations, Docket No. RM79-76-000, at 11-12 (emphasis added) [hereinafter Producers' Joint Comments]. Producers also asserted that "it is Section 121 which determines the removal of price controls not the provisions of Section 101(b)(5)." Id. at 12. Producers now argue, however, that FERC clearly missed the substance of their previous arguments. See Producers' Brief in Opposition to Petitions for a Writ of Certiorari at 15 n.14, FERC v. Martin Exploration Management Co., 108 S. Ct. 1765 (1988) (Nos. 87-263, 87-364) [hereinafter Producers' Brief in Opposition]. Producers assert, however, that in the earlier proceeding, they advocated the deregulation of § 102 gas that also qualifies as § 107(c)(5) tight formation gas as an option that FERC cannot deny. See id. at 15 n.14.  
145. Id. FERC, however, did not ignore the NGPA's second objective to provide incentives to encourage natural gas exploration and development. Instead, to reconcile the two competing goals, FERC determined "that the statutory intent to deregulate takes precedence over the statute's increased supply objective." Id. But see Producers' Brief in Opposition, supra note 143, at 13.
101(b)(5) as "helpful, but not dispositive of the dual qualification issue,"\(^\text{146}\) FERC nonetheless interpreted this section to require deregulation of dual-qualified gas.\(^\text{147}\) FERC determined that the "could result in the highest price" language of section 101(b)(5) referred to the deregulated price because that price always could result in a higher price than a regulated ceiling price.\(^\text{148}\)

In Order No. 406, FERC also responded to allegations that the deregulation of dual-category gas effectively deprived producers of the ability to collect the incentive price for natural gas qualifying under sections 107(c)(5) and 108. FERC characterized producers claims of reliance on the incentive price as "misplaced"\(^\text{149}\) and "unsubstantiated."\(^\text{150}\) FERC neither promised nor suggested that dual-qualified gas would remain regulated and thus eligible for the incentive price.\(^\text{151}\) In fact, FERC had notified producers of the possibility for deregulation of section 107(c)(5) gas in a previous interim rule.\(^\text{152}\) FERC had not duped producers; instead, producers had duped themselves by their unwillingness to consider the potential for deregulation of dual-qualified gas.

Producers petitioned FERC to reconsider the treatment of dual-qualified gas set forth in Order No. 406.\(^\text{153}\) Petitioners condemned Order No. 406 for its failure to mirror legislative intent, its unlawful and arbitrary nature, and its potential to lead to economic dislocation.\(^\text{154}\) On rehearing, in Order No. 406-A,\(^\text{155}\) the Commission denied the rehearing requests, thereby adhering to its decision to deregulate dually qualified gas.\(^\text{156}\)

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\(^{146}\) Order No. 406, \textit{supra} note 23, at 46,879.

\(^{147}\) Id.

\(^{148}\) Id.

\(^{149}\) Id.

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) Id.; \textit{see also} \textit{Interim Rule on Tight Formations, \textit{supra} note 143. In the earlier proceeding, FERC solicited:

\quad comments as to whether section 101(b)(5) of the NGPA requires the eventual deregulation of tight formation gas which also qualifies as section 103 gas the price for which is deregulated in 1985 or 1987. . . . Those that responded to this request argued that section 101(b)(5) \textit{compels} deregulation of tight formation gas when that gas is finally determined to qualify under a deregulated category. The Commission agrees and notes with regard to the change in the interim rule that this argument applies equally to new tight formation gas which qualifies under section 102(c).

\(^{153}\) Id. at 13,422 (emphasis added).

\(^{154}\) Id.; \textit{see also} \textit{Interim Rule on Tight Formations, \textit{supra} note 143. In the earlier proceeding, FERC solicited:

\quad comments as to whether section 101(b)(5) of the NGPA requires the eventual deregulation of tight formation gas which also qualifies as section 103 gas the price for which is deregulated in 1985 or 1987. . . . Those that responded to this request argued that section 101(b)(5) \textit{compels} deregulation of tight formation gas when that gas is finally determined to qualify under a deregulated category. The Commission agrees and notes with regard to the change in the interim rule that this argument applies equally to new tight formation gas which qualifies under section 102(c).

\(^{155}\) Id.

\(^{156}\) Id. at 50,638.
C. Martin Exploration Management Co. v. FERC: A Federal Court of Appeals Addresses the Dual-Qualified Issue

In *Martin Exploration Management Co. v. FERC*, natural gas producers, dissatisfied with FERC's treatment of the dual-qualification issue in Order No. 406, petitioned the United States Court of Appeals for the Tenth Circuit to reverse FERC's decision to deregulate dual-qualified gas. The Tenth Circuit was the first federal appeals court to consider the question of natural gas simultaneously qualifying under a regulated and deregulated price category of the NGPA. The challenge confronting the Tenth Circuit was not insignificant: to interpret the dual-qualification provision of the NGPA without the assistance of judicial precedent.

The Tenth Circuit held that contrary to FERC's determination that the NGPA mandated the deregulation of dual-qualified gas, the statute clearly presented producers with a choice as to the price category, whether deregulated or regulated, under which to qualify particular gas. In reversing FERC, the court of appeals characterized FERC's interpretation of the

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158. Id. at 1062.
159. See id. at 1067 n.8. However, a number of decisions have discussed § 101(b)(5) of the NGPA in dicta. *See generally* Public Service Comm'n v. Mid-Louisiana Gas Co., 463 U.S. 319, 335 (1983) (citation omitted) (stating that § 101(b)(5) "specifies that if a volume of gas fits into more than one category, 'the provision which could result in the highest price shall be applicable'"); Amoco Prod. Co. v. Western Slope Gas Co., 754 F.2d 303, 305 (10th Cir. 1985) (The NGPA "provides that, where gas falls within the scope of multiple categories prescribing different ceiling prices, the highest ceiling price is applicable."); Columbia Gas Dev. Corp. v. FERC, 651 F.2d 1146, 1156-57 (5th Cir. 1981) (stating that § 104 gas qualifying "for incentive pricing under section 102(d), 107(c)(5), or 108, under the rule of section 101(b)(5) the highest ceiling price becomes the applicable ceiling price"); Oklahoma v. FERC, 494 F. Supp. 636, 645 (W.D. Okla. 1980) ("Gas qualifying in more than one category is entitled to the highest price.")).
160. Martin Exploration, 813 F.2d at 1067 n.8. Despite the absence of judicial precedent directly addressing the dual-qualification issue, the Tenth Circuit was not without guidance. The standard of review used to evaluate FERC interpretations of the NGPA asked 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' Id. at 1065 (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842-43 (1984)). However, if Congress fails to address directly the question at issue, or if the statute itself is ambiguous, the court then "will defer when an agency has chosen between alternative possible constructions of an ambiguous statute." Id. The interpretation adopted by the agency "must be reasonable, but it need not be the only reasonable interpretation or the interpretation that the reviewing court would adopt . . . . A reviewing court will defer to an agency interpretation of an ambiguous statute unless the agency interpretation is contrary to the policies Congress sought to implement in enacting the statute." Id. (citation omitted) (emphasis added); *see infra* note 202 and accompanying text.
161. Martin Exploration, 813 F.2d at 1069.
dual-qualification issue as contrary to the legislative history and the statutory language of the NGPA. Interestingly, the court advanced this conclusion despite its admission that the drafters of the NGPA had neither contemplated the possibility of regulated natural gas prices exceeding deregulated prices, nor foreseen the anomalous result of natural gas producers preferring the regulated ceiling price to the market clearing price.

The Tenth Circuit commenced its review of Order No. 406 by considering section 121 of the NGPA. The court posited that section 121 is ambiguous because it failed to address explicitly the treatment of deregulated gas that also qualifies for a regulated price. The Tenth Circuit, however, acknowledged that in the absence of another statutory provision, FERC's decision to decontrol dual-category gas represented a reasonable construction of the ambiguous language of section 121. Despite this admission, the court did not defer to the administrative interpretation of section 121. Instead, the court concluded that Congress had anticipated the ambiguity of section 121 in section 101(b)(5) of the NGPA.

Turning to section 101(b)(5), the Tenth Circuit stated that the plain language of this section addressed the question of dual-qualified gas. Section 101(b)(5) expressly includes those categories of natural gas covered by "any maximum lawful price" or by "any exemption from such a price." The court construed the words "exemption from such a price" to apply to those categories of gas for which a ceiling price no longer exists, i.e., deregulated gas. The Tenth Circuit observed that this interpretation of "exemption"

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162. Id. at 1065.
163. Id. at 1071.
164. Id.
165. Id. at 1066. For a review of § 121 of the NGPA, see supra note 17 and accompanying text.
166. Martin Exploration, 813 F.2d at 1066.
167. Id.
168. Id. at 1067. The appellate court characterized FERC's exclusion of deregulated gas from the scope of § 101(b)(5) as "based on a strained construction of the unambiguous language of § 101(b)(5) and a misunderstanding of the purposes Congress sought to achieve in enacting the NGPA." Id.
170. Id.
171. Martin Exploration, 813 F.2d at 1067. Significantly, the Tenth Circuit did not reject FERC's suggestion that the reference to "exemption from such a price" applied to statutory provisions granting FERC the authority to establish special ceiling pricings. Id. The court had "no doubt that the reference to 'exemption' in § 101(b)(5) can refer to those instances in which FERC can exercise its statutory authority to set a different ceiling price when special circumstances are present." Id. However, the Tenth Circuit objected to FERC's reasoning that this interpretation of exemption would preclude reference to deregulated price categories. Id. "It does not follow . . . that 'exemption' does not refer to deregulated categories of gas as well." Id.
is consistent with the meaning of exemption in section 101(b)(9) of the NGPA. 172 Furthermore, in its review of section 101(b)(9), FERC itself construed the word “exemption” of this section to refer to deregulated prices. 173 The court relied on the general rule of statutory construction that a word used in two sections of a statute has the same meaning in each section. 174

After concluding that the “exemption” language of section 101(b)(5) refers to the deregulated price, the court reviewed the language of section 101(b)(5) providing that the category “which could result in the highest price shall be applicable.” 175 The Tenth Circuit focused on the precise scope of the word “could” in section 101(b)(5). 176 While not contesting FERC's supposition that deregulated natural gas prices theoretically could reach infinity, 177 the court observed that regulated gas prices also are capable of reaching a similar indefinite rate. 178 The Tenth Circuit pointed to FERC's statutory authority to raise prices for regulated gas 179 and the statutory formula for gradual increases in ceiling prices 180 to illustrate the proposition that prices for regulated gas also could attain indefinite levels. 181 The court posited that an understanding of only the theoretical possibilities suggested by the term “could,” as advanced by FERC, would render section 101(b)(5)

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172. Id. Section 101(b)(9) of the NGPA provides that:

   In the case of—

   (B) any price which is established under any contract for the first sale of natural
gas which is exempted under part B of this subchapter from the application of a
maximum lawful price under this subchapter,

   such maximum lawful price, or such exemption from such a maximum lawful price, shall not
supersede or nullify the effectiveness of the price established under such contract.


173. Martin Exploration, 813 F.2d at 1068. FERC propounded this interpretation of exemption in the Order No. 406 proceeding: “section 101(b)(9) sets forth the effect of the contract, regardless of the statutorily imposed maximum lawful ceiling prices or exemptions from ceiling prices, i.e., deregulated prices.” Order No. 406, supra note 23, at 46,879. Similarly, the United States Court of Appeals for the Fifth Circuit has interpreted “exemption” in §101(b)(9) to mean deregulated prices. See Pennzoil Co. v. FERC, 645 F.2d 360, 374 (5th Cir. 1981) (“Section 101(b)(9) provides that the applicable maximum lawful price, or any applicable price deregulation, ‘shall not supersede or nullify the effectiveness of the price established under’ any contract.”), cert. denied, 454 U.S. 1142 (1982).

174. Martin Exploration, 813 F.2d at 1068.


176. Martin Exploration, 813 F.2d at 1068-69.

177. Id. at 1068.

178. Id. The court of appeals criticized FERC for failing to interpret “could” as broadly in considering regulated gas as it had in considering deregulated gas. Id.


180. See id. § 3312(b)(2).

181. Martin Exploration, 813 F.2d at 1068.
meaningless.\footnote{182} Reasoning that the “could result” language of section 101(b)(5) provided for the “comparison of the applicable price for each category at a particular moment,”\footnote{183} the Tenth Circuit concluded that section 101(b)(5) requires that the category, whether regulated or deregulated, that could produce the highest price shall apply.\footnote{184}

To bolster its statutory interpretation of section 101(b)(5), the Tenth Circuit selected several congressional floor statements that implied a legislative intent to allow a producer the option to elect the price category, whether regulated or deregulated, under which to qualify particular gas. The court singled out the explanations of section 101(b)(5) proffered by the foremost congressional leaders on natural gas policy. The statements of Representative Dingell,\footnote{185} and Senator Jackson,\footnote{186} evinced congressional willingness to allow a producer the right to apply for the highest price, whether deregulated or regulated, to which he is entitled.\footnote{187}

The Tenth Circuit, however, did not rely exclusively on either the express language of the NGPA or its legislative history to uphold the reversal of FERC's decision to deregulate dual-qualified gas. The court of appeals proclaimed that the statutory objectives of the NGPA also supported its treatment of the dual-qualification issue.\footnote{188} The court opined that the statutory aim of the NGPA to assure adequate natural gas supplies at reasonable prices to consumers relied on both phased deregulation and incentive prices.\footnote{189} The Tenth Circuit rejected FERC's argument that the deregulation objective of the NGPA takes precedence over the statute's second objective to provide incentives to increase natural gas supplies.\footnote{190} Instead, the two approaches to natural gas regulation embodied in the NGPA require equal consideration.\footnote{191} By adopting this position, the court expressly disagreed with FERC's classification of incentive prices as an interim, and

\begin{itemize}
    \item \footnote{182} \textit{Id.}
    \item \footnote{183} \textit{Id.}
    \item \footnote{184} \textit{Id.} at 1069.
    \item \footnote{185} \textit{Id.} at 1070; \textit{see also} 124 \textit{CONG. REC.} 38,364 (1978) (statement of Rep. Dingell) (“It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him (in most cases that will be the designation which also yields the highest price").
    \item \footnote{186} \textit{Martin Exploration}, 813 F.2d at 1070; 124 \textit{CONG. REC.} 29,109 (1978) (statement of Sen. Jackson) (§ 101(b)(5) “stands for the proposition that a producer may claim or apply for the highest price to which he is entitled”).
    \item \footnote{187} \textit{Martin Exploration}, 813 F.2d at 1069.
    \item \footnote{188} \textit{Id.} at 1070-71.
    \item \footnote{189} \textit{Id.}
    \item \footnote{190} \textit{Id.}
    \item \footnote{191} \textit{Id.} at 1071.
\end{itemize}
therefore, a secondary goal of the NGPA. The Tenth Circuit charged that FERC's characterization of the NGPA as a deregulation statute displayed a misunderstanding of the statute's other objectives.

The court also did not overlook the current market price for natural gas. The Tenth Circuit candidly admitted that the drafters of the NGPA had not anticipated a decline in natural gas prices. Consequently, Congress had not foreseen the anomalous situation of producers preferring a regulated price rather than a deregulated price for natural gas. However, despite changes in the economic climate since the enactment of the NGPA, the court concluded that market conditions do not license the judiciary to alter express statutory terms.

IV. **FERC v. Martin Exploration Management Co.: Resolution of the Question of Dual-Qualified Natural Gas**

In *FERC v. Martin Exploration Management Co.*, the Supreme Court reversed the decision of the appellate court, holding that the dual-qualification provision of the NGPA mandated the deregulation of natural gas simultaneously qualifying for a deregulated and regulated price. Writing for a unanimous court, Justice Brennan relied on the plain meaning of the statutory language and the NGPA's legislative objectives to support the decontrol of dual-qualified gas.

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192. "We do not agree with FERC that the incentive prices are necessarily short-term." *Id.*

193. *Id.* The Tenth Circuit noted that "[d]eregulation is both phased and partial." *Id.* By misinterpreting the NGPA to be exclusively a deregulation statute, FERC has overlooked incentive prices and other provisions that sought to address the natural gas shortage in a different way. We will not strain the plain meaning of § 101(b)(5) in order to serve a goal of deregulation that is itself only one of several means adopted to achieve the purposes of the NGPA.

*Id.*

194. *Id.*

195. *Id.*

196. *Id.*


198. *Id.* at 1768.

199. Justice White did not participate in the consideration of this decision.


201. *Id.* at 1769.

202. *Id.* at 1768-70. Interestingly, the Court did not base its decision to deregulate dual-qualified gas on the principle of judicial deference to agency interpretation of a statute. Yet this principle has particular importance in controversies involving the NGPA. In implementing this extraordinarilily complex statute, the "Court generally accords 'great deference' to the Commission in its interpretation of the NGPA." *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053, 1069 (5th Cir. 1985), *cert. denied, Associated Gas Distrib. v. FERC*, 476 U.S.
A. Deregulation of Dual-Qualified Gas: Is It Statutorily Prescribed?

The reasoning employed by Justice Brennan to support the deregulation of dual-qualified gas is inconsistent with a careful reading of section 101(b)(5) of the NGPA. Justice Brennan concluded that section 101(b)(5) of the NGPA governed ceiling prices exclusively. However, the "exemption from such a price" language of section 101(b)(5) also could refer to deregulated gas categories because it immediately follows "any maximum lawful price" and is separated by the conjunction "or" to suggest an opposite interpretation.

1114 (1986) (citing Union Texas Petroleum Corp. v. FERC, 721 F.2d 146, 147 (5th Cir. 1983)). The Supreme Court repeatedly affirms that the interpretation of a statute by those responsible for its execution should be followed unless there are strong indications that it is erroneous. CBS v. FCC, 453 U.S. 367, 382 (1981) (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969)). The Court must only find that the agency's construction was sufficiently reasonable to uphold the administrative finding. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981) (citing Train v. Natural Resource Defense Council, 421 U.S. 60, 75 (1975); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)). Moreover, the administrative interpretation need not represent the sole reasonable one. Id. at 39. See also Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568-70 (1980) (affirming the administrative interpretation of statutory terms even though the appellate court, in reversing the agency, had adopted a reasonable approach).

Despite the curious silence of the Court on the principle of judicial deference to agency interpretation of a statute, the Court's reasoning bears an uncanny resemblance to the analysis preferred by FERC. Compare Martin Exploration, 108 S. Ct. at 1768, ("[w]hen one of the provisions sets no price ceiling at all — i.e., it deregulates — that provision governs" with Petition for Writ of Certiorari, supra note 143, at 14 ("[w]here one provision sets a maximum lawful price and another declares that there is no such ceiling, the latter provision governs"); compare Martin Exploration, 108 S. Ct. at 1769, ("the Court of Appeals' reading... has the effect of turning a statutory scheme of price ceilings and deregulation into a system of price supports for producers"), with Petition for Writ of Certiorari, supra note 143, at 17 ("[t]he [appellate] court's decision establishes a uniform and permanent producer assistance program"); compare Martin Exploration, 108 S. Ct. at 1769 ("nothing in the statute or legislative history suggests that Congress wanted the classification of gas to turn on contractural terms"), with Petition for Writ of Certiorari, supra note 143, at 14 ("[c]ontrary to the court of appeals' view, the statutory language contains no hint that it calls for comparison of producers' contracts").

203. Martin Exploration, 108 S. Ct. at 1768. Justice Brennan interpreted the language of § 101(b)(5) to require comparisons "between the highest price permitted by one provision and the highest price permitted by another." Id. Thus, Justice Brennan read "provision" to include only regulated ceiling prices. Justice Brennan, however, did not disregard completely statutory provisions that set no price ceilings. See id. He determined that deregulated price provisions superseded price ceiling provisions. Id. "When one of the provisions sets no price ceiling at all — i.e., it deregulates — that provision governs." Id. This argument has merit. However, upon the enactment of the NGPA, all price categories for natural gas arguably were subject to ceiling provisions. See supra notes 16-17 and accompanying text. Indeed, the NGPA gradually lifted ceiling prices over time. See supra note 17 and accompanying text. Unless the drafters were truly forward-looking, the provisions that could result in the highest price encompassed both regulated and deregulated gas categories.

meaning from the preceding language. Moreover, interpreting "exemption" to be a clear reference to deregulated gas categories is consistent with the use of the term in section 101(b)(9) of the NGPA. In fact, FERC itself has construed "exemption" to mean deregulated price categories.

Additional language in section 101(b)(5) sustains the inclusion of both regulated and deregulated prices within the scope of the statutory provision. The "could result" language of section 101(b)(5) suggests reference to both deregulated and regulated categories to determine the highest price applicable. Deregulated gas, unlike regulated gas, operates without the restriction of price ceilings, and, in truth, can reach higher indefinite levels. Nevertheless, this feature does not preclude regulated gas from rising to similar high levels. Furthermore, it is questionable whether Congress would...
have drafted section 101(b)(5) unless both pricing provisions, deregulated and regulated, applied. This approach only would vitiate section 101(b)(5) by forever excluding reference to one of the two price possibilities. To achieve this result, Congress simply could have limited the application of section 101(b)(5) to multiple regulated categories and to restrict its operation to pre-deregulation situations.

B. Effectuation of Legislative Objectives

Interestingly, the legislative history of the NGPA did not pervade the Martin Exploration opinion. In fact, the Supreme Court interpreted section 101(b)(5) without truly confronting the legislative history of either the provision or the statute itself. Regardless of whether the Court's disregard of the legislative history was deliberate or inadvertent, congressional floor state-

fashion.” Id. If the alternative approach prevailed, natural gas prices would vary not only from seller to seller “and from contract to contract, but from day to day as the actual market price of that gas changes.” Id.; see also Brief Amicus Curiae of the Interstate Natural Gas Association of America at 4, FERC v. Martin Exploration Management Co., 108 S. Ct. 1765 (1988) (Nos. 87-363, 87-364) [hereinafter INGAA Brief in Support] (“dually qualified . . . gas shall forever be in a state of price instability, with the price alternately flip-flopping between a regulated and a deregulated status, depending on which category will . . . produce the highest actual price”). But see Producers’ Brief in Opposition, supra note 143, at 14 (“the argument that the Court of Appeals’ result could cause frequent switches from regulated to deregulated category treatment is both factually erroneous and beside the point”).

Producers vehemently attacked the charge that dual-price treatment would cause switches from regulated to deregulated prices:

Producers committed large investments to drill, fracture and equip wells producing high cost tight formation gas and to maintain or enhance production from stripper wells in reliance on continued availability of the NGPA price incentives in these categories. Producers have been unable to negotiate new contracts in the market at the NGPA incentive category price ceilings since early to mid-1983. The relatively few producers able to benefit from regulated treatment through older contracts with ceiling price clauses covering still-regulated incentive category gas will not be making frequent switches between deregulated and regulated treatment in the current and foreseeable energy markets.

Producers’ Brief in Opposition, supra note 143, at 14.


211. See Producers’ Brief in Opposition, supra note 143, at 10-12.

212. Id. at 12.

213. Id.
ments are riddled with inconsistencies concerning the precise operation of the NGPA and its provisions.

Contradictory interpretations of the appropriate price treatment for dual-qualified gas persist in congressional statements. While individual legislators do not speak for the entire Congress, their remarks highlight the confusion and uncertainty regarding the operation of the dual-qualification provision. To illustrate, statements by Representative Dingell can be singled out either to corroborate\(^{214}\) or to contravene the decision to deregulate dual-qualified gas.\(^{215}\) Similarly, Senator Bartlett advocated the deregulation of dual-qualified gas, particularly natural gas qualifying under section 108 of the NGPA.\(^{216}\) However, additional remarks by Senator Bartlett suggest a reversal of this position: "This bill will keep under Federal controls forever the following categories of natural gas: . . . and stripper well natural gas."\(^{217}\)

The indecision over the operation of the dual-qualification provision reflected Congress' larger uncertainty over the precise purpose of the NGPA. In the NGPA, Congress attempted to correct the market distortions resulting from the regulation of natural gas prices under the NGA.\(^{218}\) Congress concluded that the NGA pricing formula fostered imbalance in the supply of and demand for natural gas.\(^{219}\) Recognition that continuation of administrative determination of prices would perpetuate disorder in natural gas markets prompted Congress to introduce a plan of deregulation.\(^{220}\) Congress, however, hesitated to legislate immediate decontrol of all natural gas prices and, in turn, fashioned a phased deregulation scheme in order to increase gradually the role of market forces in setting natural gas prices.\(^{221}\) Furthermore, to protect consumers from inordinate increases in natural gas prices, Congress maintained price controls on several gas categories.\(^{222}\) Both the production-incentive and price-control provisions of the NGPA manifest the congressional commitment to encourage natural gas production at reason-

\(^{214}\) See supra note 124 and accompanying text.

\(^{215}\) See supra note 123 and accompanying text.

\(^{216}\) Senator Bartlett stated that stripper wells are deregulated "only to the extent that such wells are otherwise new wells and would be deregulated anyway." 124 Cong. Rec. 31,387 (1978); see also supra note 126 and accompanying text.

\(^{217}\) 124 Cong. Rec. 29,379 (1978). Senator Bartlett also advised that "[t]heir character as stripper wells, as shown under section 121, does not get them deregulated in any way." 124 Cong. Rec. 31,387 (1978); see also supra note 127 and accompanying text.

\(^{218}\) See supra notes 84-85 and accompanying text.

\(^{219}\) See supra notes 83-84 and accompanying text.

\(^{220}\) See supra notes 88, 94-95 and accompanying text.

\(^{221}\) See supra notes 95-96 and accompanying text.

\(^{222}\) See supra note 93 and accompanying text.
able prices to consumers.\footnote{223}

Significantly, the Supreme Court looked to the legislative objectives of the NGPA to support its decision to decontrol dual-qualified gas.\footnote{224} The Court charged that dual-price treatment for dually qualified gas would "turn[ ] a statutory scheme of price ceilings and deregulation into a system of price supports for producers."\footnote{225} Indeed, the Court correctly observed that Congress did not intend to create a producer assistance program with the passage of the NGPA.\footnote{226} However, contrary to the Court's claim, Congress did not dismiss the importance of price assistance for producers in the NGPA. The production-incentive provisions of the NGPA attest to the congressional awareness for the necessity of price assistance to induce natural gas production.\footnote{227} Moreover, the Court's observation that Congress did not suggest "that producers should receive higher prices than deregulation would afford them"\footnote{228} overlooked one crucial fact. Congress expected natural gas prices to rise, not to fall, with deregulation.\footnote{229} Congress viewed deregulation as "the most favorable regime for producers"\footnote{230} because of its belief, albeit mistaken, that market prices would exceed regulated prices.

V. Conclusion

\textit{FERC v. Martin Exploration Management Co.} resolved the debate over

\footnote{223. \textit{See supra} note 96 and accompanying text. Producers addressed the legislative goals of the NGPA.}

\footnote{224. Courts often recognize that statutory interpretation must review not only the language employed, but also its logic. \textit{See} Salt River Project Agric. Improvement and Power Dist. v. FPC, 391 F.2d 470, 474 (D.C. Cir.), \textit{cert. denied}, 393 U.S. 857 (1968). "For statutes, as the Supreme Court has said, are 'instruments of government,' not 'exercises in literary composition.'" 391 F.2d at 474 (quoting \textit{United States v. Shirey}, 359 U.S. 255, 260 (1959)). Furthermore, the Court sanctions "[d]eparture[s] from a literal reading of statutory language . . . to effect the legislative purpose," \textit{Malat v. Riddell}, 383 U.S. 569, 571-72 (1966), and allows the judiciary to "look through the statute itself to what lay behind it." \textit{Salt River Project}, 391 F.2d at 474 (footnote omitted).}


\footnote{226. \textit{Id}.}

\footnote{227. \textit{See supra} note 95 and accompanying text.}

\footnote{228. \textit{Martin Exploration}, 108 S. Ct. at 1769.}

\footnote{229. \textit{See supra} notes 27, 194 and accompanying text.}

\footnote{230. \textit{Martin Exploration}, 108 S. Ct. at 1769.}
the dual-qualification issue by deregulating natural gas simultaneously qualifying under a regulated and deregulated price category of the NGPA. The decision of the Supreme Court effectively will lower the price for dually qualified natural gas.

Current market conditions, however, obviate any significant price effect resulting from the deregulation of dual-qualified natural gas. Natural gas prices have plummeted since the passage of the NGPA. Without the higher prices necessary to support drilling programs, producers have severely curtailed exploration and development of hard-to-produce natural gas reserves. Absent the addition of new supplies of sections 107 and 108 natural gas, the volumes of natural gas subject to dual-qualification will remain minimal.

Alternatively, if natural gas prices escalate in the future, the deregulation of dual-qualified natural gas could regain significance. With higher market prices, it is unlikely that pipelines and consumers will continue to herald the deregulation of dually qualified gas. Faced with public outcry over rising gas costs, FERC quickly may regret its decision to decontrol dual-qualified gas. Despite a return of high natural gas prices, Congress likely will not revisit the dual qualification issue because of the inherent controversy and divisiveness that accompanies federal legislative attempts to regulate natural gas prices.

231. The parties contest the price magnitude of the deregulation of dual-qualified gas. See INGAA Brief in Support, supra note 210, at 2-3 n.3 (maintaining that absent deregulation of dual-qualified gas, total gas costs would have increased by $300 million). But see Producers' Brief in Opposition, supra note 143, at 17 (characterizing the financial impact of dual-price treatment of dual-qualified gas as "minimal").

232. Congress, however, may not rely on the pricing provisions of the NGPA to address the potentially deleterious impact on natural gas production of the Supreme Court's decision in Martin Exploration. To illustrate, Senator Domenici recently introduced legislation to reinstate the Tight Sands Tax Credit for this hard-to-produce natural gas. S. 2859, 100th Cong., 2d Sess., 134 Cong. Rec. S14,515-16 (daily ed. Oct. 4, 1988).

Unconventional fuels, including tight sands gas, qualify for a tax credit provided that crude oil prices drop to a certain level and the gas price remains regulated. See 26 U.S.C. § 29 (Supp. IV 1986); see also Credit for Producing Fuel from a Nonconventional Source, Stand. Fed. Tax Rep. (CCH) ¶ 492 (1987). The requisite "price level [for crude oil] was reached in 1984, and a tax credit of 52 cents per million cubic feet of gas was provided." 134 Cong. Rec. S14,516 (daily ed. Oct. 4, 1988) (statement of Sen. Domenici). The availability of the tax credit was at the discretion of the producer. "If a producer chose a regulated [natural gas] category, it was entitled to the Tight Sands Credit. If it chose deregulated, the Tax Code did not provide a credit." Id.

Martin Exploration, however, eliminated the tax credit for tight sands gas by deregulating this dual-qualified gas. While "[t]he credit was not an issue before the Supreme Court . . . , as a result of this ruling, the credit has been unavailable since January 1, 1985." Id. The deregulation of dual-qualified gas, coupled with the abolition of the Tight Sands Tax Credit, has harmed natural gas producers. See id. As explained by Senator Domenici, "[t]he worst case
gress, changed conditions in natural gas markets could resurrect the natural
gas industry’s unrest with the dual-qualification issue.

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scenario has happened: The price drop has occurred and the tax credit was abolished by the
FERC order." *Id.*

Despite the fact that Congress adjourned without considering Senator Domenici’s initiative,
see Gas Daily, Oct. 21, 1988, at 2, col. 3 ("The bill . . . is expected to be brought up again in the
next session of Congress.")*, the legislation indicates congressional recognition that the deregul-
lation of dual-qualified gas poses serious problems for the continued production of hard-to-
Domenici). Absent a regulated status for hard-to-produce natural gas, producers require the
credit to maintain operations. *Id.* (stating that “the most influential factor in deciding to con-
tinue production . . . has been the Tight Sands Credit”). If Senator Domenici’s bill is any
indication, the dual-qualified gas issue may reappear in the next congressional session.