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APPEAL FROM JARNDYCE V. JARNDYCE:  
THE STATE ROLE UNDER THE NATURAL  
GAS POLICY ACT OF 1978  

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Senator J. Bennett Johnston, a member of the House-Senate Conference Committee charged with resolving the differences between the House and Senate versions of the natural gas bills passed in 1977, remarked that the protracted and wearisome deliberations of over a year's duration were not unlike those recounted in the following passage from Charles Dickens' *Bleak House*, in which he described the case of *Jarndyce v. Jarndyce*:  

The case had gone on so long that it exhausted finances, patience, courage, hope; so overthrew the brain and broke the heart; that there was not an honourable man among its practitioners [conferees] who would not give—who did not often give—the warning, "suffer any wrong that can be done to you rather than come here!"  

The modern day comparison of the federal government's regulation of natural gas to the *Jarndyce* case is indeed an apt one. Its regulation has truly exhausted the "finances, patience, courage and hope" of both the regulators and the regulated.² This article focuses  

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   Mr. President, I saw the old show, "Beverly Hillbillies" when it was current on television. The picture was shown of old Pa out in Arkansas firing his rifle into the ground and oil gushed out. The family became rich and moved to Beverly Hills. Mr. President, under this bill, finding gas would only be the beginning of the Beverly Hillbillies worries. 124 CONG. REC. S14,592 (daily ed. Aug. 25, 1978) (remarks of Sen. Long). For a terse, but excellent review of federal natural gas pricing policies and politics, see Bethell, *The Gas Price Fixers*, HARPER'S, June 1979, at 37.  
2. Charles Curtis, Chairman of the Federal Energy Regulatory Commission (FERC), is reported as testifying during the debate on the Natural Gas Policy Act of 1978 (NGPA) that the Commission had a pending backlog of 9,807 producer rate filings and 3,012 producer certificate cases attributable only to the regulatory requirements under the Natural Gas Act of 1938 (NGA). 124 CONG. REC. S15,227 (daily ed. Sept. 15, 1978) (remarks of Charles Curtis).
on the state's role in the natural gas regulatory scheme set up by the Natural Gas Policy Act of 1978 (NGPA).

REGULATION OF NATURAL GAS PRIOR TO THE NGPA

Federal

In the 1920's natural gas, generally discovered in combination with crude oil, was often flared due to the lack of developed markets. Consumer recognition of this inexpensive fuel, coupled with the perfection of the seamless steel pipe which enabled gas to be shipped at high compression for long distances, resulted in the creation of markets miles from the wellhead. Unfortunately, concomitant with this development, problems arose due to the small number of powerful holding companies that had gained monopolistic control over the limited number of interstate pipeline systems. This situation was further aggravated by circumstances conducive to monopoly at the production end. Due to the initial low field prices and the fact that the pipeline companies themselves owned production, the producer was often forced to sell his gas at distressed prices. Thus, the potential existed for the interstate pipeline "middleman" to exact exorbitant prices at the expense of both the producer and the consumer. Clearly the need for governmental intervention existed.

As a result of prior Supreme Court decisions, state regulatory commissions were precluded from exercising jurisdiction over the regulation of prices paid to interstate pipelines; additionally, the federal government lacked regulatory jurisdiction. Recognizing the need to eliminate this regulatory lacuna, the Federal Trade Commission (FTC) recommended to Congress a regulatory scheme which would complement the state's affirmed ability to regulate the sales

3. The exploration for natural gas has become a separate enterprise primarily as a result of the expansion of these pipelines; indeed, less than twenty-five percent of all gas produced comes from oil wells. See C. HAWKINS, THE FIELD PRICE REGULATION OF NATURAL GAS 221 (1969).


6. Natural gas pipelines were excluded from the jurisdiction of the Interstate Commerce Commission, which regulated oil pipelines only. 49 U.S.C. § 1(1)(b) (1976). FERC now regulates both, see 42 U.S.C.A. § 7172(a)(b) & (c) (1979).
of "once interstate gas" after it had entered the state. In response, Congress passed the Natural Gas Act of 1938 (NGA). The NGA resulted from a congressional determination that the "business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation . . . is necessary in the public interest."9

The argument can be advanced that, in limiting the scope of the NGA to the pipeline link between production and distribution, Congress chose to exempt from federal controls those two sectors of the natural gas industry. Underlying this argument is the concept of federalism, whereby states possess the power to regulate the property and activities of persons within their boundaries. It appeared that Congress, after its assertion of power over the interstate commerce aspects of the natural gas industry, had left the regulation of intrastate gas markets to the states. However, sixteen years after the passage of the NGA, the Supreme Court, in Phillips Petroleum Corp. v. Wisconsin,10 indicated that the power of the states to regulate the intrastate market was not absolute. The Court held that sales by producers to interstate pipelines were "sales for resale" within the ambit of the Act and, thus, the Federal Power Commission (FPC)11 had the power to regulate them. More specifically, the Court held that the production and gathering exemption12 did not nullify the authority granted the FPC to regulate interstate sales by producers.13 Subsequently, the FPC began the arduous task

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13. After Phillips, and prior to passage of the NGPA, provisions forbidding the pumping of gas into interstate commerce had been a precautionary device written into gas contracts. A typical pre-NGPA commingling clause read:

**Interstate:** Buyer represents and agrees that the gas delivered to Buyer hereunder will be gas transported and sold entirely within the State of ______ and will not have been commingled with any gas destined for transportation, sale, or use in interstate commerce. Buyer shall be entitled to grant to ______ (third party) the right to make sales of a limited term for the transportation and resale outside the State of ______ to an interstate market provided that such sales would not be subject to the jurisdictional consequences of federal administrative and legislative actions. If such sale is found to be subject to Federal jurisdiction, this contract
of setting "just and reasonable" rates,\textsuperscript{14} utilizing three methods of price calculation: (1) treating producers as individual public utilities by setting limits on prices which reflected the cost of service plus a reasonable rate of return;\textsuperscript{15} (2) setting ceiling prices based on the cost of producing gas in certain geographical areas;\textsuperscript{16} and (3) setting prices on a competitive "national area rate,"—a rate roughly equivalent to then existing intrastate rates.\textsuperscript{17} In response to forecasts of severe shortages of natural gas during the winters of 1975-77, and to Congressional dissatisfaction with the NGA regulatory scheme's inability to insure an adequate supply of gas for the interstate market, the Senate passed the first Pearson-Bentsen deregulation amendment to the emergency provisions of S. 2310 in October of 1975.\textsuperscript{18} In February of 1976, the Krueger-Brown deregulation attempt in the House almost succeeded in winning approval.\textsuperscript{19} Finally, presidential candidate Jimmy Carter wrote a letter to the governors of three producing states promising, if elected, to "work with the Congress, as the Ford Administration has been unable to do, to deregulate new natural gas. [D]eregulation of new gas would encourage sales in the interstate market and help lessen the prospects of shortages in the non-producing states which rely on interstate supplies."\textsuperscript{20}

shall terminate automatically twenty-four (24) hours preceding such sale.


FERC now has the authority to prohibit this type of clause as "against public policy and unenforceable" as it pertains to gas governed by the NGPA, 15 U.S.C.A. § 3374 (1978).


\textsuperscript{16} The area rate methodology was upheld in \textit{The Permian Basin Area Rate Cases}, 390 U.S. 747 (1968).

\textsuperscript{17} The methodology of determining the rate was upheld in \textit{American Public Gas Ass'n v. FPC}, 587 F.2d 1016 (D.C. Cir. 1977). \textit{See also} Tenneco Oil Co. v. FERC, 571 F.2d 834 (5th Cir.), cert. denied, 439 U.S. 801 (1978).

\textsuperscript{18} 121 CONG. REC. S33,655 (1975) (Senate vote). S. 2310 contained two parts: Title One was to provide emergency relief during the winter to high priority users unable to obtain sufficient amounts from their suppliers. Title Two would have permanently deregulated the price of new natural gas found onshore, effective April 5, 1976; new offshore, effective January 1, 1981. The House instead passed a bill deregulating small producers and increasing regulation of major producers. No conference committee was held on the two bills, leaving as then-Congressman Krueger called it, "[a]nother year under the logically bankrupt system of Federal price controls." H.R. Rep. No. 543, 95th Cong., 1st Sess. (1977).

\textsuperscript{19} The vote on H.R. 9464 is located at 122 CONG. REC. H2656 (1976). The real test vote, however, was on the Smith Substitute to the Krueger Substitute which passed 205-201. 122 CONG. REC. H2648-49 (1976).

Louisiana Regulation

While the interstate battle raged in Congress, the courts, and the FPC, regulation in the intrastate market proceeded peacefully. As the Supreme Court noted, "The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other."

23. LA. CONST. art. XIV, § 16(A); LA. CONST. art. VI, § 1(c) (1921). The Commissioner of Conservation has the responsibility for exercising these powers. He may issue rules, regulations, and orders to carry out his duties pursuant to LA. R.S. 30:4-6 & 8 (1950 & Supp. 1979).
drilling, casing, and plugging; (2) to require operators of wells to have efficient gas-oil ratios; (3) to regulate secondary recovery methods; and (4) to regulate spacing of wells into established drilling units. The power of the Commissioner to extensively regulate gas operations in the state, under the broad mandate of preventing waste, often deprives landowners and producers of much of their freedom to exploit hydrocarbons as they see fit. Illustrative of this is the power to order the unitization of separately owned interests in an oil or gas field.

Overseeing the oil and gas operations in Louisiana is no small undertaking. In 1977 the state ranked first in the nation in the marketed production of natural gas, contributing approximately forty percent of the total domestically produced natural gas moved interstate.

Federal/State Relationship

During his candidacy, President Carter impliedly recognized the importance of the gas producing states’ roles in regulating gas within their borders by favoring legislation to decontrol new gas, thereby returning to the states a portion of the power that, arguably, had been taken away from them by the Phillips decision.

In the report accompanying the transmittal of his National Energy Plan (NEP) to Congress, President Carter noted:

A national energy plan can be built only on a foundation of partnership and understanding among the federal government, [and] the states ... which regulate or own a substantial part of United States energy resources. Many of the programs proposed

27. LA. R.S. 30:9 & 10 (1950). Unitization allows property lines to be ignored in order to prevent separate interest owners from exploiting the underlying minerals without regard to prudent conservation practices and the rights of adjoining property owners. Alfred Kahn once described what would happen without unitization by analogizing it to the placing of an ice cream soda with several straws before a group of small boys. J. BLAIR, THE CONTROL OF OIL 154 (1976). The power of the state through the commissioner to unitize lands and deprive the landowner of his right to drill wells upon his land and produce minerals was affirmed in Hunter Co. v. McHugh, 202 La. 97, 11 So. 2d 495 (1942), appeal dismissed, 320 U.S. 222 (1943).
in the Plan cannot succeed without the active cooperation of state and local governments.30

However, much to the chagrin of gas producing states, the NEP called for legislation to do away with what was called the "artificial distinction between interstate and intrastate markets" which had become "unworkable, indeed intolerable, as the amount of new gas increasingly flow[ed] to the unregulated intrastate markets at the expense of interstate consumers."31 The NEP proposed an extension of federal price controls to the intrastate market to eliminate this artificial distinction. Thus, the existing and future supplies of gas not previously committed or dedicated to the interstate market under the NGA, and therefore regulated exclusively by the states, would now come under the aegis of the FPC. This proposal led the Office of Technology Assessment (OTA) to comment that, while the NEP called for "active roles and major responsibilities for state and local governments, with few exceptions, however, it is not clear what these roles and responsibilities are to be. In fact, by emphasizing the leadership role of the federal government and largely ignoring problems of intergovernmental cooperation, the Plan appears to downgrade the importance of other levels of government in energy decisionmaking." This was especially important because "[i]n some cases they [the states] lose powers they now have . . .."32

While citing numerous examples contained in the NEP of the reduction in the present role played by state governments,33 the OTA report nonetheless stressed the fact that states would be assigned a central role in the regulation of surface mining, reclamation, resource extraction, electricity pricing and transmission, energy facility siting, and the enforcement of mineral rights laws on non-federally-owned land. Adding to this list the leadership roles in energy conservation and comprehensive energy planning that some states had already assumed, the report suggested that "a 'new federalism' has been formed in recent years in which the states have been restored to a full policymaking partnership with the Federal

30. THE NATIONAL ENERGY PLAN, EXECUTIVE OFFICE OF THE PRESIDENT, ENERGY POLICY AND PLANNING 89 (1977) [hereinafter NEP].
31. Id. at 52-53.
32. OFFICE OF TECHNOLOGY ASSESSMENT, ANALYSIS OF THE PROPOSED NATIONAL ENERGY PLAN 174-175 (1977) [hereinafter cited as OTA ANALYSIS].
33. Examples of situations in which states are essentially treated by the plan as enforcers of federal laws and standards include: federal building standards, NEP supra note 30, at 40; coal, nuclear, and hydroelectric power. Id. at 63. Areas in which states are treated as mere allocators of federal funds include: grants for building conservation, id. at 42; and grants for municipal solid waste programs. Id. at 77.
Government." Notwithstanding the NEP, federal/state coordination had been encouraging.

Delegation of certain federal responsibilities to the states is one means of effectuating a national energy policy. The NGPA's delegation of authority to the states appears to satisfy the objectives of the federal government in working as a partner with the states to qualify gas for federal price ceilings, while at the same time avoiding infringement upon the state's historic conservation role. The maintenance of this delicate balance should not preempt state regulation and make the state agency a mere appendage of the federal government. The ability of the state to work within its historic arena concurrently with the federal government is feasible as long as the federal agencies understand the symbiotic relationship involved. During debate on the Act, for example, there was much discussion about providing a statutory requirement that natural gas producers operate their properties as "prudent operators." While enforcement of this requirement would have been performed exclusively by a state regulatory agency, the pro-

34. OTA Analysis, supra note 32, at 177.
35. Federal air and water pollution control statutes give the states initial authority to develop and implement plans for achieving environmental standards subject to federal review. Pollution statutes, e.g., the Clean Air Act, 42 U.S.C.A. §§ 7101-352 (1977), were passed because of the failure of state initiatives in the area. Compare to this situation, however, the prior existence of Louisiana's gas regulatory scheme. See generally Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196 (1977).
36. One of the most vivid examples of the type of federal-state coordination that will have to occur in the future on energy matters is the Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, 93 Stat. 749. The Act contains provisions whereby the federal government sets energy reduction targets for each state based on its historic use of energy. The state then has the option of voluntarily reducing its energy usage to meet the target. After a grace period, should the state fail, the federal government will impose a federal conservation plan on the state.
37. The goal is not insurmountable. Former Governor Edwards has commented on the state/federal consultation in solid and hazardous waste regulatory development that:

From the State's perspective, RCRA (the Resource Conservation and Recovery Act), is a landmark in that the statute:... emphasizes the States' continuing primacy in solid waste management, while allowing a State's solid waste program to be based on minimum Federal criteria for solid waste disposal facilities, yet maintains the integrity of the State's permit and enforcement programs.

38. The NGPA's delegation authority is contained in section 503, 15 U.S.C.A. § 3413 (1979). The power of Congress to delegate this authority to state officials is constitutionally permissible, provided it does not impose upon the states imperative obligations. Parker v. Richard, 250 U.S. 235, 239 (1919).
posed enforcement plan would first need Federal Energy Regulatory Commission (FERC) approval. The "prudent operator rule," if not already statutorily recognized in gas producing states, is certainly a judicially recognized standard of good faith in carrying out the terms of natural gas leases. The provision was defeated by the conferees early in the conference. While Congress debated the matter, the federal judiciary was reviewing FERC's authority to require producers to act as "prudent operators" in developing and maintaining the deliverability of their gas reserves. The United States Court of Appeals for the Fifth Circuit ruled that FERC had overstepped its authority by transgressing the specific exclusion from its jurisdiction of the production and gathering of natural gas. The Supreme Court upheld the decision, leaving to the states those matters technically involved with the deliverability of gas from reservoirs.

Section 505 of the NGPA also recognizes that states continue to have the primary authority and power to regulate gas production within their historic sphere. Thus, although the state's power in

40. Id.
41. "A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform his contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor." LA. MIN. CODE: LA. R.S. 31:122 (Supp. 1974). For a discussion of the prudent operator rule in Texas, Oklahoma and New Mexico, see Clayton v. Atlantic Refining Co., 150 F. Supp. 9 (D.C. N.M. 1957).
42. ACTIVITY REPORT OF THE HOUSE AD HOC COMM. ON ENERGY H.R. REP. NO. 95-1820, 95th Cong., 2d Sess. 56-59 (1979) [hereinafter cited as STATUS REPORT].
44. Shell Oil Co. v. Federal Energy Regulatory Comm'n, 566 F.2d 536 (5th Cir. 1978).
45. The Fifth Circuit had noted in its opinion: "To hold that the power to issue Order No. 539-B is within the jurisdiction of the FERC would all but eliminate the 'production and gathering' exclusion and would allow the FERC to encroach on areas reserved to the states. We cannot so extend the authority of the Commission." Id. at 540-41.
46. 15 U.S.C.A. § 3415 (1978) provides:
(a) Authority to intervene.
(1) Intervention as matter of right. The Secretary of Energy may intervene as a matter of right in any proceeding relating to the prorationing of, or other limitations upon, natural gas production which is conducted by any State agency having regulatory jurisdiction over the production of natural gas.
(2) Enforcement of right to intervene. The Secretary may bring an action in any appropriate court of the United States to enforce his right to intervene under paragraph (1).
(3) Access to information. As an intervenor in a proceeding described in subsection (a) of this section, the Secretary shall have access to information available to other parties to the proceeding if such information is relevant to the issues to which his participation in such proceeding relates. Such information may
the field is not unlimited, the intent of Congress in enacting the NGPA appears to have been to establish ceiling prices only, leaving conservation matters to the states.

The President's NEP, with few changes, proceeded through the House of Representatives in less than one hundred days. The Senate, however, divided the NEP into five parts and voted on them separately. While the House had called for increased regulation of natural gas, the Senate, after a filibuster of thirteen legislative days, voted to deregulate new interstate gas. The Conference Committee began work on reconciling these two disparate bills and, on November 9, 1978, the NGPA was signed into law by the President.

**LEGISLATIVE FRAMEWORK OF THE NGPA**

The legislative framework of the NGPA is substantially different from that of the previously controlling NGA. As stated in the introduction to the regulations implementing the Act, "the Natural Gas Act had in many respects been limited, replaced or superseded by the NGPA, although it continues to be of significance with respect to gas previously dedicated to interstate commerce." The most evident change from the NGA is the "substitution of a series of specific statutory maximum price levels applicable to discrete types of first sales of natural gas for the previously established system of price regulation of interstate sales of natural gas which had been grounded in a cost-based (utility-type) methodology." The

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47. **STATUS REPORT**, supra note 42, at 21 & 35.
48. NEP was originally introduced as S. 1469. S. 2104 contained the natural gas pricing proposal and was reported out of the Energy Committee on September 7, 1977 without recommendation.
50. **II FED. ENERGY GUIDELINES, FERC, STATS. AND REGS. 30,026** [hereinafter cited as **ENERGY GUIDELINES**].
51. **Id.**
most important distinction concerning producer regulation under the two Acts, however, is the expansion of the FERC’s jurisdictional scope to encompass sales in the intrastate market.

The NGPA is divided into six subchapters. The two most relevant in regard to the state regulatory role are subchapter one, concerning pricing determinations, and subchapter five, concerning administrative review and enforcement. Subchapter one delineates the regulations controlling the pricing of first sales of gas anywhere in the United States. Under the framework of this subchapter, there exist two major categories of first sales: (1) those sales requiring a prior determination of eligibility, which must be made by a federal or state jurisdictional agency before the collection of the maximum lawful price is permitted; and (2) those sales explicitly not requiring such a determination. In order for the producer to take advantage of the higher pricing provisions of the NGPA, notably under sections 102, 103, 107, or 108, the state conservation commission must first make the determination that indeed his gas can be classified as falling under at least one of the named sections. The statutory authorization enabling the producer to have his gas classified at the state level, subject to approval at the federal level, is contained in section 503.

54. The federal jurisdictional agency is the United States Geological Survey (USGS) for new gas located on the outercontinental shelf as well as on onshore federal lands. Under 18 C.F.R. § 274.501(d) (1979), the USGS may agree with the state jurisdictional agency to allow that state agency to make determinations, although the gas is located on federal lands within the state.
55. 15 U.S.C.A. § 3413 (1978). Thus, except for the gas which was committed or dedicated by November 8, 1978, the current NGA regulatory scheme would be terminated. For new sales in interstate commerce, the producer need not dedicate new gas reserves nor seek abandonment permission from FERC in order to sell to another purchaser upon termination of the contractual term (with the exception of the “right of first refusal” contained in 15 U.S.C. § 3375(b) (1979)). The Commission may set “just and reasonable” rates above the maximum lawful ceiling price in two instances: to encourage investment in wells involving high risks and high costs, 15 U.S.C. § 3317(b) (1979); and when the Commission deems it necessary to permit rate relief in the form of adjustments under 15 U.S.C.A. § 3412(c) (1979).
State Determinations Under the NGPA

Section 503(c)(1) provides that a state agency having regulatory jurisdiction with respect to the production of natural gas is authorized (unless that right is waived under section 503(c)(2)) to make determinations referred to in subsection (2). The state determination, unless reversed by FERC under section 503(b), allows the producer to collect prices for that gas up to the statutory ceilings contained in the NGPA.

The regulations implementing the NGPA add two new subchapters to chapter one of title 18 of the Code of Federal Regulations. Subchapter 14 contains new producer regulations. Those relevant to the present discussion include: part 270, which sets forth general rules applicable to the entire subchapter; part 271, containing the maximum lawful prices allowed under sections 102 through 109; and parts 274 and 275, which provide for determinations of eligibility by state agencies and FERC review of those determinations.

According to part 274.501, a state jurisdictional agency has NGPA classification authority if the well's surface location is within a state's borders, onshore and offshore. Louisiana's designated agency is the Conservation Commission, which filed its report with FERC stating that "it will take such steps as are reasonably necessary or appropriate to perform its functions" under the

57. The Office of Pipeline and Producer Regulation (OPPR) within FERC is responsible for assuring that the determinations of the various jurisdictional agencies are properly made. 18 C.F.R. § 3.5(f) (1979). Within the OPPR is the Division of NGPA Compliance which performs producer audits. If the investigating staff finds possible infractions of the NGPA regulations, the Division will turn the case over to the FERC Office of Enforcement, which is responsible for litigation involving civil and criminal penalties. Section 3314 generally makes it unlawful for any person to sell natural gas at a first sale price in excess of any applicable maximum lawful price or to otherwise violate any provision, rule, or order of the Act. Final determinations of state and federal agencies are binding on that gas and are not subject to further FERC or judicial review by a Court of Appeal, unless a misstatement or omission of a material fact was made in the agency's determination of the gas classification by the producer. 15 U.S.C.A. § 3413(d) (1978). There is, in this case, no statute of limitations. The procedure for reopening a determination is contained in 18 C.F.R. § 275.205 (1979). The NGPA, unlike the NGA, also grants the power to assess civil penalties. 15 U.S.C.A. § 3414(b)(6)(A) (1979).
58. Where possible, final regulations issued through April of 1980 are taken into account in this section's discussion.
59. 18 C.F.R. § 274.501(a)(2) (1979). For federal lands within Louisiana, the jurisdictional agency is the Area Oil and Gas Supervisor in Tulsa, Oklahoma.
NGPA. Although the NGPA allows the agency to use its state procedures, part 274.105 requires it to include in its initial report certain information specifying the manner in which the determinations will be made. FERC requires the following seven items to be included in the state report:

1. filing requirements imposed by the state agency above those FERC requires the producer to file with the jurisdictional agency under subpart B;
2. the type of notice applicants must give to purchasers;
3. the public notice that will be given by the agency of filings, hearings, and determinations;
4. the internal procedures the agency will use in making its determinations, including the use of hearings and formal consideration by the agency;
5. the extent to which parties may intervene or otherwise express views in proceedings before the agency;
6. a description of the relevant data contained in the agency's official records; and,
7. a detailed explanation of the manner in which the agency will review applications.

MINIMUM FERC FILING REQUIREMENTS

FERC's minimum filing requirements are important because of the scope of its review over the state finding. By directing what the producer will file at the state agency level, FERC can, in effect, dic-
tate in advance what it determines will be the kind and amount of evidence that will constitute "substantial evidence in the record upon which such determination was made." 69 The legislative history is clear that, although Congress allowed FERC to specify the form and content of NGPA filings before the state agency, this authority was limited by the caveat that its right of review is confined to the "narrow question of whether or not the agency determination is supported by substantial evidence" and that there was no intention to allow FERC to "second guess the agency by independently weighing the evidence . . . as if the initial responsibility were placed in the Commission." 70

The four categories which the state may determine are discussed below. Generally, all four require a standardized FERC form 121 which requires information such as well location and operation, a sworn statement that the information contained therein is correct, and a description of the applicant's diligent search of all records relative to the category sought. 71

New Gas

New onshore gas may be gas produced from a well: (1) 2.5 miles from a marker well, (2) 1,000 feet deeper than a marker well within 2.5 miles, or (3) which is drilled in a new reservoir. 72 Under the first two categories the producer must file a location plat of his well and any other well within the 2.5-mile radius which has produced gas after January 1, 1970. If any other wells are so identified, the applicant must prove they are not marker wells by a demonstration that none produced gas in commercial quantities from January, 1970 through April 20, 1977. 73 Unlike the relatively simple objective measurement data required for the first two categories, the new reservoir definition is more subjective, depending on geological and engineering evidence. Thus more substantiation is required in the form of well logs, formation structure maps, well potential tests, and

70. Energy Guidelines supra note 50, at 3126 (statement of managers).
71. Energy Guidelines supra note 50, at 30,207. Records include, but are not limited to, production, state severance tax, and royalty payment records. Louisiana's Administrative Procedure Act contains detailed rules for adjudication proceedings which allow for judicial notice of generally recognized technical or scientific facts within the agency's specialized knowledge, as well as for authority to exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence, La. R.S. 49:956(1) (Supp. 1966). Section 503(c)(3) of the NGPA allows the state agency to use its normal procedures, limited by FERC's authority, to prescribe the form and content of the filings.
73. 18 C.F.R. § 274.202 (c)(1)(i) to (iv) (1979).
other geological data. The producer must also declare whether gas was produced in commercial quantities from the reservoir prior to April 20, 1977 and whether it was penetrated before that date by an old well (drilled before March 19, 1977) from which gas or oil was produced in commercial quantities from any penetrated reservoir. If the second part is answered in the affirmative, the producer must declare whether gas could have been produced in commercial quantities before April 20, 1977, from any identified old well. If gas could have been produced before this date from an old well, that fact will prevent its being classified as new under the NGPA if suitable facilities for its production and delivery to a pipeline were in existence on April 20, 1977. This is the "withheld gas exclusion," the purpose of which was to prevent gas producers from obtaining the higher NGPA new gas prices by withholding gas in anticipation of the Act's passage.

New Onshore Production Well Gas

This category was created by the Conference Committee to allow for development of geological structures similar to the San Juan Basin in New Mexico where, in order to increase production from reservoir rocks with low permeability, additional wells needed to be drilled.

To classify, the producer must declare that the well is new (spudded after April 19, 1977), satisfies any applicable federal or state well-spacing requirements, and is not within a proration unit.
in existence at the time the drilling of the well was begun, which unit is applicable to the reservoir from which such gas is produced and which unit applied to any other well which either produced gas in commercial quantities or the surface drilling of which was begun before February 19, 1977, and was thereafter capable of producing gas in commercial quantities. If the producer wants to qualify gas from a new well drilled into an existing proration unit, additional regulations must be satisfied.

**High-Cost Gas**

The high-cost category relevant to Louisiana is that gas found below 15,000 feet. Qualification under the regulations is relatively simple, requiring the submission of proof of the required depth.

**Stripper Well Gas**

This gas is defined as nonassociated gas produced during any month if, during the well’s preceding 90-day production period, it produced an average of 60 mcf or less per production day at its maximum efficient rate of flow determined in accordance with recognized conservation practices designed to maximize the ultimate recovery of natural gas. What constitutes recognized conservation practices of the NGPA.

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81. Id. at § 274.204 (1979).
82. The applicant must file evidence to demonstrate by “appropriate geological evidence and engineering data that the new well is necessary to effectively and efficiently drain a portion of the reservoir covered by the proration unit which cannot be effectively and efficiently drained by any existing well within the proration unit.” Id. at §§ 274. 204(f) & 271.305(b) (1979).
83. Id. at § 271.702-4 (1979). High-cost gas is defined at section 107 as:

For purposes of this section, the term “high-cost natural gas” means natural gas determined in accordance with section 3413 of this title to be—

1. produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from a completion location which is located at a depth of more than 15,000 feet;
2. produced from geopressed brine;
3. occluded natural gas produced from coal seams;
4. produced from Devonian shale; and
5. produced under such other conditions as the Commission determines to present extraordinary risks or costs.

84. Except for special categories that present extraordinary risks or costs, all other high-cost categories are deregulated upon the effective date of the first incremental pricing rule. 15 U.S.C.A. § 3331(b) (1979).
85. The maximum efficient rate of flow (MER) provisions are found at 18 C.F.R. § 271.804 (1979).
is left to the discretion of the state regulatory body. 86

The filing requirements are separated into four sections: (1) general application for determination; (2) notice by an operator or purchaser for an increase in production; (3) determination of increased production resulting from installation of enhanced recovery techniques; and (4) designation that a well is seasonally affected. 87

To initially qualify the well, the producer must file actual production records—if not available, tax records or verified copies of billing statements may be substituted if based on average production for the 90-day period. 88 Also, results of any tests measuring the production capability of the well are required; if production tests are unavailable and the maximum efficient rate of flow has not been previously established, 89 the producer must submit other records which demonstrate that the well produced nonassociated gas at a rate not exceeding an average of 60 mcf per production day during a 12-month period. 90

Section 271.805 allows a stripper well to remain categorized as such, provided production does not rise above the qualifying flow rate. 91 There are two exceptions to this rule. The first allows greater than 60 mcf per day, provided the state jurisdictional agency determines that the production increase resulted from enhanced recovery techniques and was not the result of the producer holding back pro-

86. "The conferees intend that the appropriate state or Federal regulatory body with authority to make determinations under section 503, will determine what constitutes application of recognized conservation practices." ENERGY GUIDELINES supra note 50, at 3096-97.


88. 18 C.F.R. § 274.206(a)(2) (1979) was amended to allow a summary of the contents of the records or billing statements in lieu of the actual documents, if permitted by the jurisdictional agency’s filing requirements.

89. See note 85, supra.

90. 18 C.F.R. § 274.206(a)(3)(i) & (ii) (1979). If gas was not produced during the 90-day production period, the number of days and a description of the state law or conservation practice recognized or approved by the state agency which prohibited the production must be filed. Id. at § (a)(7). If days were not included and production was not prohibited by the agency, the applicant must state the number and reasons production did not occur. Id. at § (7)(ii).

91. If it does, the operator must follow the procedures in 18 C.F.R. § 271.805 (1979) "Continuing Qualification" as well as give notice to parties under section 274.206(b). The required notice in section 271.805(a)(1) terminates the right of any seller to collect the maximum lawful price in section 271.802 from the well identified in the notice unless the jurisdictional agency acts on the petition to requalify the well according to section 271.806. If the notice is filed by the purchaser, the operator has 30 days from that date to oppose the allegation or seek the jurisdictional agency’s affirmation that the increased production was due to enhanced recovery methods or seasonal fluctuations. Id. at § 271.805(d) (1979).
duction, qualifying as a stripper well, then raising production while retaining the benefit of the higher stripper price. The second exception allows a well that is "seasonally affected" to continue to receive the stripper price, although production rises above 60 mcfs. The application is similar to the one for enhanced recovery, with the exception of requirements for 24-month production records and a description of the nature of the seasonal fluctuations.92

Alternative Minimum Filing Requirements

Section 274.207 "Alternative filing and notice requirements" acknowledge that as FERC and the state commissions develop expertise under the NGPA, they may want to agree to other methods of determining NGPA classifications within the statutory parameters. Recognizing this, states may file alternative producer filing plans which may be approved by FERC.

REVIEW OF STATE DETERMINATIONS UNDER THE NGPA

Overview

After the notice requirements under the regulations93 are completed, the FERC review process begins.94 Section 503(b)(1)(B) requires that FERC make a determination of preliminary reversal within 45 days of the state agency's notification of its determination and a final finding to reverse within 120 days, or the state determination stands.95 Thus, by the 46th day96 following notification

92. Id. at § 274.206(d) (1979).
93. When the determination is administratively final, the state agency is required, within 15 days, to give written notice of the determination to FERC. Id. at § 274.104 (1979).
94. The Commissioner of Conservation's NGPA determination procedures imply that an agency determination is administratively final only after the applicant has exhausted his administrative remedies including the filing of a motion for rehearing. The rehearing motion must be filed within 10 days after the determination is completed. LA. RULE 4.6. The motion must contain one or more of the following grounds: (1) the decision is clearly contrary to the law and the evidence; (2) the party has discovered relevant new evidence which could not have, with due diligence, been obtained before or during the hearing; (3) there is a showing that issues not previously considered ought to be examined to properly dispose of the matter; or (4) further consideration of the issues and the evidence would further the public interest. Id. at 5.1. The Commissioner may either grant or deny the rehearing as well as abrogate or modify his previous determination. Id. If he does not act on the motion within 30 days, the application for rehearing is deemed to have been denied.
96. 18 C.F.R. § 275.202 (1979). An incomplete notice under (b) keeps the 45-day period from running until the jurisdictional agency and others are notified. Subsection
by the state agency, one of three actions must have occurred: (1) a preliminary finding to reverse was issued, (2) a preliminary finding to remand was issued, or (3) the determination was deemed final because of FERC’s failure to act within the 45-day period. Neither of the first two preliminary findings is subject to judicial review, being in the nature of the Commission’s exercise of its suspension authority under section 205 of the Federal Power Act and section 4 of the NGA. However, after they become final, both actions are subject to judicial review: the court may order a reversal based on the substantial evidence test or a remand under the arbitrary and capricious standard.

Scope of Review

The NGPA states explicitly that FERC, in exercising its review function over the state agencies, may reverse only on grounds that there is no substantial evidence in the record. This section 503 review is the same standard as that provided for judicial review of FERC orders and rules under section 506 of the Act; nonetheless, it is submitted that there are special differences between the scope of review under the two sections. Section 506’s review provision is modeled after the NGA, and thus cases decided under the NGA may be studied to discern the traditional definition of substantial evidence as it relates to rate cases. In the Permian Basin Area Rate Cases, the Court stated:

Section 19(b) of the Natural Gas Act provides without qualification that the “finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.” More important, we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission’s expertise, and those who would overturn the Commission’s judgment undertake the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences... We are not obliged to examine detail of the Commission’s deci-

(c) provides for withdrawals of notice and applications and for public notice; and (d) for procedures following a notice of preliminary finding by FERC.

The scope of review was limited by four factors: (1) the well-known statutory substantial evidence standard; (2) the judicially recognized "presumption of validity" implied from the Congressional limitation; (3) the longstanding total effect test of Federal Power v. Hope Natural Gas Co.,\textsuperscript{103} and (4) a zone of reasonableness to compensate for the necessarily imprecise nature of cost determinations and the inherent difficulties of the regulatory undertaking.\textsuperscript{104} Although all four of these criteria could conceivably apply to section 503 determinations, the first two are the most relevant. The latter two are inappropriate in the context of NGPA determinations, considering the difference in the nature of the proceedings for ratemaking by FERC and in the NGPA state process. Without much statutory guidance, other than that rates be just and reasonable, final ratemaking decisions could be and probably were subjective on the Commission's part. Thus, much concern was given by the reviewing courts to insure that a proper record was made by the Commission. At the same time, however, due to the inherent subjectivity in the proceedings, the courts developed the "total effect" and the "zone of reasonableness" tests, recognizing the uncertainties in ratemaking, yet also attributing to the FPC a high degree of expertise.

The state agency's discretion in making determinations under the NGPA is much more limited than the broad ratemaking power granted the FPC under the NGA. The NGPA carefully prescribes the factual circumstances which will justify the classifications. It does not seem so great a burden, for instance, to document that a well is 2.5 miles from another. The only category approaching a subjective determination is the new reservoir definition, but even this category is capable of documentation through credible objective evidence. There is simply not much room for an abuse of discretion at the state level, because what will constitute substantial evidence, as far as FERC is concerned, is clearly defined.

In addition, the NGPA has made a fundamental change in FERC's prior NGA authority to set prices. Congress has determined, by passage of the NGPA, what are just and reasonable rates for cer-

\textsuperscript{102} Id. at 767 (citations omitted).

\textsuperscript{103} 320 U.S. 591 (1944).

\textsuperscript{104} To illustrate, the Court in the Permian Basin Area Rate Cases noted that one of the criteria for review of a rate order was "whether the order my reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed and yet provide appropriate protection to the relevant public interests, both existing and forseeable." 390 U.S. at 792.
tain higher-priced categories of gas based on projected production responses.\textsuperscript{105} FERC, instead of setting the rates, is now limited to determining whether correct factual determinations were made in the qualification process.

As this review illustrates, the traditional substantial evidence test, as it applies to the FERC review of state determinations, no longer relies on a "zone of reasonableness" consideration nor a "total effect" factor. What remains relevant from the NGA test, however, is the judicially recognized "presumption of validity" implied from the Congressional limitation of review.\textsuperscript{106} Since the NGPA also requires that the scope of review be limited to the question of substantial evidence, it is suggested that a state agency's determination should be given the same presumption of validity that courts have given FERC actions under the NGA. It is not a novel idea that a special agency's expertise in certain matters entitles its decisions to a presumption of correctness, or at least puts that agency in a better position to draw inferences from presented facts than can a reviewing court or Commission.\textsuperscript{107} The fact that Congress assigned this decisionmaking power to state agencies implies a recognition that the conservation commissions, with their staffs of geologists and technicians and with their proximity to the source of supply, are best equipped to make the necessary factual findings and thus, their work should be entitled to great deference.\textsuperscript{108}


\textsuperscript{106} The Statement of Managers notes that the Conferences intended that the question of whether the state agency is supported by substantial evidence shall be a question of law and may be reversed if not in accordance with the requirements of law. Energy Guidelines supra note 50, at 3126. This statement may be interpreted to prevent FERC from making any law-fact distinctions and to limit its review to an over-all determination of whether the evidence, taken as a whole, affords a substantial basis upon which to uphold the determination.

\textsuperscript{107} As Chairman Curtis noted after the NGPA had been passed:

I personally believe that from an administrative point of view the new direction is both sensible and workable, and carves out an appropriate role for the states. Under the NGPA, the applications must be verified by geological and production records of the type which are generally maintained by state conservation commissions. To the extent that on site inspections are required, the state agencies are geographically well situated to fulfill this responsibility. To the extent that an applicant is required to make an appearance in connection with an application, generally speaking the burden will be substantially less if the appearance can be made in the state where production is located.

\textit{Hearing on Impact of Natural Gas Prices on Consumers Before the Senate Subcomm. on Intergovernmental Affairs of the Governmental Affairs Comm., 95th Cong., 2d Sess. 27-29 (1979) (statement of Charles Curtis).}

\textsuperscript{108} 18 C.F.R. § 275.203 (1979). Grounds for a protest are that the determination is: (1) not supported by substantial evidence; (2) inconsistent with information contained in FERC's public files and which was not part of the record in which the determination
Protests to Jurisdictional Determinations

The standing requirement, regulating who may protest state determinations at the FERC level, is very broad, giving the right to "any person" without a requirement that the protestor have previously appeared before the jurisdictional agency.\textsuperscript{109} Much care has been taken to assure that all parties wishing to appear and present views in a gas determination have the opportunity to do so. Although arguably within the purview of FERC's general rulemaking authority under section 501, these procedures could run afool of the rulemaking restraints announced in \textit{New England Power v. FPC},\textsuperscript{110} which held that such a general grant of authority cannot be used to expand the agency's substantive powers. The court, discussing provisions similar to section 501 contained in the NGA and the Federal Power Act, noted:

Both sections are of an implementary rather than substantive character. The cases have made abundantly clear, that, while these provisions must be read in a broad expansive manner, they can only be implemented consistently with the provisions and purposes of the legislation and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act. These sections merely augment existing powers conferred upon the agency by Congress. They do not confer independent authority to act.\textsuperscript{111}

The point is that there must be a substantive provision in the NGPA that justifies FERC's implementation of a rule under section 501. A strong argument could be made that the protest procedure created by FERC does not conform with the purposes of the NGPA and actually contravenes the intent of the section 503 delegation to

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\textsuperscript{109} The avowed reason for the inclusion of the protest procedure is that insufficient notice is given by the state agencies, in accepting and making NGPA determinations, to interested persons other than to the parties to the proceedings themselves. The protest procedure protects the rights of these third parties at the FERC level. Louisiana has a broad protest procedure, see note 66, supra.

\textsuperscript{110} 467 F.2d 425 (D.C. Cir. 1972).

\textsuperscript{111} \textit{Id.} at 430-31, quoting Public Service Comm'n of New York v. FPC, 327 F.2d 893, 896-97 (2d Cir. 1964); Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (2d Cir. 1967).
the state agency of the authority to make specific factual determinations. In effect, by allowing any party to present new evidence at the FERC level, the implied intent of Congress to accord the determinations of jurisdictional agencies a presumption of validity so long as the substantial evidence standard is met is defeated. Instead, the protest procedure invites parties to introduce evidence into FERC’s records which could transform FERC’s appellate review function into a trial de novo in explicit contravention of the statutory language. FERC is not to “second guess” or independently weigh the jurisdictional agency’s evidence. Furthermore, in keeping with the review function mandated by Congress, FERC should not be in the position of receiving evidence de novo, just as a court of appeals is prohibited from doing so in reviewing FERC orders under the NGA.112

In order to protect the state agency’s grant of jurisdiction, FERC could accept new evidence, provided some sort of extraordinary cause can be shown as to why a similar presentation was not made at the state level. For example, a valid basis for such a finding may be that newly discovered evidence exists which is pertinent to the determination. Louisiana’s Conservation Commission recognizes this as a factor justifying reconsideration.113 At the minimum, a protestor at the FERC level should be required to justify his failure to make an appearance at the state level before FERC allows the protest.114

Judicial Review

Judicial review of final FERC actions pertaining to state determinations is allowed only under the authority of section 503(b)(4)(B)

112. 15 U.S.C. § 717r(b) (1976). The court may, however, should reasonable grounds be shown for failure to adduce the evidence before the commission, order such evidence to be presented before the commission.

113. LA. RULES 5.1(1)-(4). One jurisdictional agency suggested that it was inconsistent with the NGPA to allow protestors to submit information with their protest, and have that information become part of the “public records of the Commission,” within the meaning of section 503(b)(1)(D). FERC responded that such a procedure was required under section 501(a)’s authority to “issue . . . such rules and orders as it may find necessary or appropriate to carry out its functions under this Act.” One of its functions is review of state determinations. Failure to consider reliable evidence submitted by a protestor within the 45-day review period would be unreasonable. ENERGY GUIDELINES supra note 50, at 30,427-28.

114. 18 C.F.R. § 275.204(c) (1979) requires reasons for nonappearance at the state level but does not provide any such strict scrutiny test. FERC rejected this complaint noting that it could not prescribe procedures applicable to jurisdictional agency determinations, and that the limited time it has in reviewing the state determinations, would not allow for resolution of controversies over what constitutes good cause for failure to appear. If experience illustrated abuse, FERC stated, it would consider changing its protest procedures. See note 113, supra.
Any person aggrieved or adversely affected by a final finding of FERC may seek review in the court of appeals for any circuit in which the party is located or has its principal place of business or in the District of Columbia Appellate Court, provided a petition is filed within sixty days after the determination is final. Review is governed by a substantial evidence standard. Given the propensity of the appellate courts to give great weight to FERC's actions in the past under the NGA, the review most likely will be narrow.

A conflict appears to exist between the intent of the conferees as expressed in the Joint Statement of Managers and the provisions of section 503(c)(4). The joint statement notes: "Nothing in this Title (V) is intended to limit the jurisdiction of state courts to decide questions of state law. A party aggrieved by procedural aspects of state or Federal agency determinations may pursue whatever appeal rights are otherwise available under state or Federal law." This language conflicts with section 503(c)(4), which limits judicial review of final FERC actions to federal courts of appeal. It is suggested that this tends to "federalize" questions of state law, notwithstanding the contrary language noted above. Suppose, for example, that a state agency were to determine that certain natural gas qualifies as new onshore production well gas under section 103, but the decision is reversed by FERC on the ground that the well was in a proration unit within the meaning of section 103(c)(3). While the determination of what constitutes a proration unit is one of state law, the only route for judicial review is apparently in federal court under section 503. Thus, the state law question is removed to federal court, contrary to the conferees' intent to allow state courts to review questions of state law. It seems, however, that the only reason for the question of what constitutes a proration unit to appear before a federal court is because the issue figures in the

115. Section 503(c)(4), 15 U.S.C.A. § 3413(c)(4) (1979) reads: "[a]ny such determination referred to in subsection (a)(1) of this section made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b) of this section." And section 503(c)(4), 15 U.S.C.A. § 3413(b)(4)(B) (1979) provides:

Any person aggrieved or adversely affected by a final finding of the Commission under paragraph (1) may within 60 days thereafter file a petition for review of such finding in the United States Court of Appeals for any circuit in which the party involved in such determination is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such finding of the Commission if the State or Federal agency determination involved is supported by substantial evidence.

116. Id.

classification of natural gas under federal law. It must be remembered that FERC's standard and scope of review is a substantial evidence standard mandated by the statute. All issues pertaining to state law that come to mind immediately are carefully defined in the NGPA. Should FERC attempt to substitute its judgment as to which state laws are and are not preempted by the NGPA, the aggrieved party can certainly seek a reversal of the Commission's own reversal on the grounds that the Commission exceeded its authority under the Act.

Assuming FERC has the authority to decide issues of state law subject to federal court review under section 503(b)(4)(B), the question becomes whether there is any mechanism that will allow state court participation. One route that does not appear to have been envisioned by the conferees is for the Federal court of appeals to utilize Louisiana's certification procedure, whereby a federal court can ask the state supreme court to answer questions of state law which are determinative of the case. Since the federal reviewing court under section 503(b)(4)(B) may only reverse FERC's decision upon a finding that the original agency determination was supported by substantial evidence, the applicant might instead urge that the decision at the FERC level interpreting state law is not a "finding" under section 503, but is, instead, a "rule" within the meaning of the Federal Administrative Procedures Act, being an agency statement of "general applicability" and "future effect"; thus, the general judicial review authorized in section 506(b) of the NGPA should be available. If an issue of state law is decided that, practically speaking, FERC will necessarily apply in future determination reviews, the federal court, for comity reasons, might consider this alternative.

CONCLUSION

The increasing depletion of the nation's producing states' hydrocarbon resources opens up the possibility of increasing strains

118. LA. R.S. 13:72.1 (Supp. 1972) states:

The supreme court of this state may, by rule of court, provide that when it shall appear to the Supreme Court of the United States, or to any court of appeals of the United States, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there is no clear controlling precedent in the decisions of the supreme court of this state, such federal appellate court may certify such question or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state may, by written opinion, answer.


between those states that have and those that do not. The federal government has decided to referee these competing interests in the natural gas area by passage of the NGPA. While economists may disagree as to the arguments for and against decontrol, the fact remains that Congress has entered into the debate and will inevitably do so again. Thus, the real concern should be the federal government's understanding and proper respect for the states' historic and future autonomy, with the goal being active cooperation rather than confrontation.

Fortunately, the agency charged with implementation of the NGPA, the Federal Energy Regulatory Commission, appears to understand this relationship. Two recent examples of willingness to cooperate with the state agencies are the alternative filing requirement regulations and the rules on the determination of tight sands reservoirs. FERC has accepted a proposal, filed by the New Mexico Oil Conservation Division, which allows the applicant to satisfy the requirement that a new well be necessary to effectively and efficiently drain a portion of a reservoir within an existing proration unit without submitting the "appropriate geological evidence and engineering data" to demonstrate this fact every time a well is drilled. The fields have been the subject of hearings by the Conservation Division, which decided that the existing proration units could not be effectively and efficiently drained by the existing wells. Thus, the applicant may satisfy the above requirement by specifying the appropriate New Mexico order authorizing an infill well drilling program. This procedure will streamline NGPA determinations without sacrificing the policies of the Act.

Another rule which promotes cooperation with the states is FERC's decision to grant state agencies the authority to nominate tight sands for Commission approval. Recognizing that the jurisdictional agencies have the best access to the production history and geological information relating to potential tight formations, the rule did not specifically identify formations, but rather established guidelines for identification of the sands. The state agencies will establish their own procedures, conduct their own investigations, and submit their written recommendations to FERC, which will then review the nomination. Originally, the rule would have set criteria and allowed FERC to make the initial determination. It is hoped that this spirit of cooperation will continue.

This article has outlined the possibility and promise of state and federal cooperation in the implementation of the NGPA determina-

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122. Id. at 30, 900-20.
tion process. The real lesson of the NGPA, however, as evidenced by the debate during the bill, is not what state and federal agencies can eventually accomplish together, but instead what the President and the Congress in its future energy deliberations should consider before they intrude unnecessarily upon areas of practiced state control. As then-Congressman Krueger noted when the NGPA first left the House Ad Hoc Energy Committee: "Like the mule, this policy can have no pride of ancestry nor hope of posterity. It is the sterile offspring of economic naiveté and political expedience. Congress must address, not avoid, our national energy problems."¹²³

Regardless of the social purposes envisioned, political "expedience" should never preempt the consideration of views of those people closest to the action which is being regulated. By involving states in the deliberation process at an early stage, no action delegated to the states by the federal government need suffer delay, as did the Jarndyce case.
