

**THE FEDERAL ENERGY REGULATORY COMMISSION AND
THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS:
AN OVERVIEW AND COMPARISON OF THE LEGAL STRUCTURES AND RESPONSIBILITIES
OF TWO OVERARCHING REGULATORY AUTHORITIES**

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INTRODUCTION

The United States of America (USA) and the European Union (EU) are both politically grounded in representative government; however, USA Federalism differs significantly from the legal position of EU Member States, a difference that affects the regulation of natural gas companies in the two jurisdictions. Specifically, the U.S. Constitution and the laws enacted by the U.S. Congress distinguish between (1) wholesale and interstate transactions and (2) retail and intrastate transactions. They give authority to and responsibility for the first to the Federal Energy Regulatory Commission (FERC or the Commission) and reserve authority to and responsibility for the second to public service commissions in the individual 50 states. As a consequence, FERC cannot interfere in state or local matters, and the states are legally preempted from regulating interstate or national energy matters. Also, as a consequence, there is a uniform interstate energy policy at the national level, and a variety of energy policies at the local and state levels. In contrast, the legislation passed by the EU Parliament and Council do not make that distinction and give authority to and responsibility for wholesale, retail, and internal transactions to the regulatory authorities in the individual 27 member countries. As a consequence, because that authority and responsibility are more or less the same as transposed into national law in those countries, the regulations for wholesale, retail, and internal transactions are *theoretically* harmonized and promote cross-border consistency. For a variety of reasons, however, “even laws may be unevenly implemented across the EU.”^{1/} Until recently, no EU-wide agency had authority comparable to FERC’s to oversee “inter-member-state” or pan-national energy transactions. That partially changed in June 2009, with the passage of the Third Legislative Package for the Liberalization of the Energy Markets, which created the Agency for the Cooperation of Energy Regulators (ACER or the Agency).

The purpose of this paper is to compare FERC and ACER, and discuss briefly the implications for natural gas companies operating or otherwise affected by regulatory oversight in the two jurisdictions. Starting with FERC, the older of the two agencies, the paper will describe the voluntary organizations of regulators that play significant roles in both the USA and the EU, and then discuss FERC’s and ACER’s regulatory authority and responsibilities, in particular their monitoring, advisory, decision-making, and enforcement powers. It will conclude with a comparison of the two agencies.

^{1/} Martijn Groenleer, *Regulatory governance in the European Union: the political struggle over committees, agencies and networks*, to be published in Levi-Faur, D., *Handbook on the Politics of Regulation*, Cheltenham: Edward Elgar (2011) at pp. 548-562. [Hereinafter, Groenleer at 1-12.]

FEDERAL ENERGY REGULATORY COMMISSION

I. Background: FERC and NARUC

FERC is an independent Federal regulatory agency created by the U.S. Congress through the Department of Energy Organization Act on October 1, 1977. ^{2/} That act also abolished the Federal Power Commission, FERC's predecessor established in 1935, and transferred most of its regulatory mission to FERC. The Commission has five members who are appointed by the President of the United States with the advice and consent of the U.S. Senate to five-year staggered terms. Each Commissioner has an equal vote on regulatory matters and no more than three Commissioners may belong to the same political party. One member is designated by the President to serve as Chairman and chief administrative officer. As such, he or she is responsible for management of the agency's staff and budget, and for development of the Commission's agenda. ^{3/} Commission members and staff are subject to strict conflict of interest laws that prohibit their involvement (directly or indirectly through a close relative) with any energy company, including owning any interest in such company. They are also subject to strict post-employment restrictions.

FERC receives its mandate in the form of enabling statutes from the U.S. Congress, which may delegate vast authority and powers to the Commission, provided the delegation is not precluded by the U.S. Constitution (e.g., the Constitution generally prohibits the Federal government from interfering in local matters). FERC activities are also subject to oversight by the U.S. Congress, which additionally influences FERC policies through the budget appropriations process. In this regard, for FY12, FERC asked the U.S. Congress for an appropriation of \$ 304,600,000 (U.S.), and requested a staffing level of 1,500 full time employees. FERC reimburses the U.S. Treasury for the money appropriated by Congress for its operation by assessing annual charges and fees on the companies that it regulates.

FERC is headquartered in Washington, D.C., and has regional offices in Portland, Oregon; Chicago, Illinois; San Francisco, California; New York City, New York; and Atlanta, Georgia. The regional offices focus on the safety of hydropower projects licensed by FERC. The agency also has staff assigned to two regional electric markets, the California Independent System Operator in Folsom, California, and the Midwest Independent System Operator in Carmel, Indiana. Its Office of Electric Reliability has a satellite office in Hagerstown, Maryland. ^{4/}

Completing the oversight of energy companies in the USA are state regulatory authorities, which voluntarily participate in an organization called the National Association of Regulatory Utility Commissioners (NARUC). Founded in 1889, NARUC is a non-profit organization dedicated to representing the state public service commissions which regulate the utilities that provide essential retail services such as energy, telecommunications, water, and transportation. Most state commissioners are appointed to their positions by their governors or legislatures, while

^{2/} 42 U.S.C. § § 7171-7178.

^{3/} At the end of 2011, the Commission was composed of the following members: Chairman Jon Wellinghoff (Democrat) and Commissioners Marc Spitzer (Republican), Phil Moeller (Republican), John Norris (Democrat), and Cheryl LaFleur (Democrat). Commissioner Spitzer's term expired on December 31, 2011, and, as of December 1, 2011, President Obama had not nominated another non-Democrat to fill the position.

^{4/} FERC has responsibility for safety matters in three areas: hydropower projects, LNG facilities, and the reliability of the bulk electric system (generally, transmission lines above 100 kV).

commissioners in thirteen states are elected. NARUC's mission is to serve the public interest by improving the quality and effectiveness of public utility regulation. NARUC is a member-driven organization supervised by the Board of Directors, which consists of 20 members plus the Association's President, the First and Second Vice Presidents, and each Past-President who is still an active NARUC member. The Chair of each standing committee is also a member of the Board. Members are appointed by the current NARUC President and serve four-year terms. As the supervisory body, the Board oversees the Association's general and financial functions and approves resolutions that serve as the Association's policy. ^{5/}

FERC stands separate and apart from state agencies because FERC's jurisdiction over wholesale and interstate transactions preempts state action in these areas. FERC commissioners and staff frequently participate in NARUC meetings, however, and attempt to cooperate with NARUC members in regard to matters of mutual interest that do not involve conflicts of interest. NARUC members and NARUC itself also participate in FERC proceedings, sometimes taking positions adversarial to FERC. NARUC and its members have also sued FERC in U.S. Federal courts when they have disagreed with the FERC's decisions. ^{6/}

II. Regulatory Authority

As mentioned earlier, FERC's regulatory authority is derived from a series of enabling statutes enacted by the U.S. Congress. The main statute outlining the composition of the agency is the Department of Energy Organization Act of 1977. ^{7/} The Commission's role in regulating the natural gas industry is largely defined by the Natural Gas Act of 1938. ^{8/} Under sections 3 and 7 of the Natural Gas Act, the Commission regulates the construction of new on-shore LNG import terminals and natural gas pipelines and storage facilities. Under sections 4 and 5 of the Natural Gas Act, it oversees the rates, terms and conditions of sales for resale and transportation of natural gas in interstate commerce to ensure they are just and reasonable and not unduly discriminatory. The Commission's jurisdiction over wholesale sales of natural gas is limited by the Natural Gas Policy Act of 1978 as amended by the Wellhead Decontrol Act of 1989. ^{9/} Pipeline siting and construction is authorized by the Commission if found to be required by public convenience and necessity. The Commission's actions on LNG and pipeline projects typically require consideration of factors under the National Environmental Policy Act of 1969, the Endangered Species Act, the Coastal Zone Management Act and other environmental statutes. Regulation of the production and gathering of natural gas, as well as retail sales and local distribution of natural gas, are matters left to the states.

^{5/} At the end of 2011, the NARUC Board was composed of the following members: Chairman David Wright (South Carolina Public Service Commission), First Vice President Phillip Jones (Washington Utilities and Transportation Commission), Second Vice President Collette Honorable (Arkansas Public Service Commission), Treasurer David Ziegner (Indiana Utility Regulatory Commission), and four past presidents (Tony Clark, North Dakota Public Service Commission; David Coen, Vermont Public Service Board; Marsha Smith, Idaho Public Utilities Commission; and Stan Wise, Georgia Public Service Commission). The executive director was Charles Gray.

^{6/} See, e.g., *Louisiana Public Service Commission v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008) (challenging FERC's interpretation of Entergy System Agreement that governs off-system sales); *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) (challenging FERC's rule to standardize generator interconnection agreements).

^{7/} See *supra* note 2.

^{8/} 15 U.S.C. § § 717-717z.

^{9/} 15 U.S.C. § § 3301-3432.

As a final matter with respect to natural gas regulatory authority, FERC decisions may be challenged by anyone adversely affected or “aggrieved” by those decisions in a U.S. Court of Appeals. These courts, as the name indicates, are appellate courts and not trial courts. As a jurisdictional prerequisite, those seeking to appeal FERC decisions must first seek reconsideration (called “rehearing”) before the Commission. The decisions of the U.S. Courts of Appeals are reviewable by the Supreme Court of the United States. ^{10/}

III. Regulatory Responsibilities

A. Monitoring Power

FERC has vast authority to monitor the operations and activities of companies that fall within its jurisdiction. It exercises that authority in large part by requiring those companies to submit reports, complete forms, and post information on their web sites. For example, the Commission requires companies subject to its jurisdiction to submit annual and quarterly financial reports. ^{11/} The Commission uses these financial reports for a variety of purposes, including establishing cost-based rates and consideration of whether existing rates continue to be just and reasonable. The Commission also requires certain natural gas market participants to file Annual Reports of Natural Gas Transactions in order to provide greater transparency concerning the use of indices to price natural gas and how well index prices reflect market forces. ^{12/} In addition, FERC requires interstate natural gas pipelines (the USA’s version of Transmission System Operators) to post, *inter alia*, certain contract information for firm service, including the name of shipper, the name of releasing shipper if capacity is involved in a release, the rate charged, the applicable maximum rate, the duration of the transaction, receipt and delivery points and zones or segments covered by the contract, the quantity of the gas to be transported, and any affiliation with the shipper. ^{13/}

FERC staff also oversees and analyzes the nation’s natural gas and electric power markets, taking into account the related financial markets.^{14/} They continuously examine and monitor the structure and operations of these markets to maintain situational awareness and identify problems and market events as they arise. They develop and disseminate their analyses through daily meetings in the agency’s Market Monitoring Center, internal publications, presentations at open Commission meetings and other public conferences, material posted on the Oversight Website, and briefings for industry and foreign delegations.^{15/} Staff’s outreach efforts further include monthly calls with state commissions, as well as meetings with market stakeholders. Regular monitoring of energy markets is designed, in part, to identify potentially

^{10/} See 15 U.S. C. § 717r.

^{11/} See 18 C.F.R. § 260.1 (2010) (Form No. 2). During FY2009, over 500 filers submitted annual financial reports as well as quarterly financial reports.

^{12/} See 18 C.F.R. § 260.401 (2010) (Form No. 552). In FY2009, approximately 1,100 filers submitted such reports to FERC. In FY2010, the reports showed that purchases and sales of U.S. physical natural gas increased by 6% over the previous year – a total of 121,617 trillion Btu of gas in 2010 compared to 114,272 TBtu of gas in 2009. See <http://ferc.gov/market-oversight/mkt-snp-sht/mkt-snp-sht.asp>.

^{13/} See 18 C.F.R. §284.13(b) (2010).

^{14/} FERC and the U.S. Commodity Futures Trading Commission (CFTC) signed a Memorandum of Understanding (MOU) in October 2005, and agreed to share information regarding investigations under their respective jurisdictions. Both agencies are also required to enter into two additional MOU’s under the mandate of the Dodd Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, which greatly expanded the CFTC’s jurisdiction to cover derivatives and swaps as well as futures contracts. As of December 1, 2011, the agencies had not finalized either MOU.

^{15/} See, e.g., <http://ferc.gov/market-oversight/mkt-views/2011/10-20-11.pdf>.

inappropriate market participant behavior, such as anomalous market outcomes that can not be readily explained by supply and demand fundamentals (e.g., price differences across locations that are not consistent with historical patterns and known external forces). Staff researches such anomalies to determine, among other things, whether there are indications of possible fraud. If fraud or manipulation is detected, they refer the matter to the agency's investigators. ^{16/}

B. Advisory Power

FERC has limited advisory power, or, more precisely, responsibility, as there is no other executive branch agency to which it reports or for which it is responsible. In legal terms, it is an "independent Federal government agency." Accordingly, FERC's primary "advice" is given to the U.S. Congress, upon request, as that legislative body considers new legislation or requires an update on existing law. Accordingly, FERC commissioners and even FERC staff testify frequently at Congressional committee hearings, or otherwise brief members of Congress and their staffs, as they did, for example, before Congress passed a massive energy law in 2005, the Energy Policy Act. As directed by Section 1810 of that Act, FERC has also submitted semi-annual reports describing the progress made in licensing and constructing an Alaska natural gas pipeline. ^{17/} Further, FERC participates in many inter-Federal agency forums, and provides advice accordingly, and, as mentioned earlier, FERC takes part in NARUC activities and shares its expertise and opinions with state regulators.

C. Decision-making Power

FERC is essentially a decision-making agency, with extensive and comprehensive authority over natural gas transactions in interstate commerce. Accordingly, no company may build a new pipeline that moves natural gas in interstate commerce without receiving some form of FERC authorization. No interstate pipeline company may transport gas through its lines unless it has a FERC-approved rate. No company may build an LNG facility in state waters without FERC's approval. No company that sells natural gas at wholesale, if it is affiliated with any kind of pipeline company (interstate, intrastate, local distributor), may sell that gas without FERC authorization. Moreover, as discussed above, all companies regulated by FERC are subject to reporting and posting requirements to facilitate transparency for other companies and individuals that are affected by FERC regulation.

The burdens associated with FERC decision-making are also accompanied by benefits. A company that is authorized by FERC under the Natural Gas Act to build a new pipeline facility is granted the right of eminent domain. A company that charges a FERC-approved rate for moving gas through its lines is generally guaranteed that rate unless it chooses to revise it. ^{18/} A company

^{16/} An enforcement action taken by FERC against Amaranth Entities and trader Brian Hunter was initiated after the monitoring staff discerned an anomaly in the close of the futures market as reported by the New York Mercantile Exchange (NYMEX). See *In re Amaranth Advisors*, 128 FERC ¶ 61,154 (2009) (\$7.5 million settlement); *Brian Hunter*, 135 FERC ¶ 61,054, *order on reh'g*, 137 FERC ¶ 61,146 (2011) (\$30 million penalty for violation of market manipulation rule).

^{17/} See, e.g., <http://www.ferc.gov/legal/staff-reports/angta-twelfth.pdf>.

^{18/} FERC may change a pipeline company's rate on its own motion or upon complaint from a member of the public, but any changes are prospective only. FERC has rarely modified a pipeline's rates on its own motion outside a generic rulemaking proceeding, although at the insistence of Chairman Jon Wellinghoff, the Commission initiated proceedings in 2010 and 2011 to investigate several interstate pipelines' rates.

that is authorized to build an LNG facility is not subject to FERC's rate or open access jurisdiction. A company that sells gas at wholesale still subject to FERC jurisdiction can do so under blanket authorization and charge whatever the market will bear.

FERC wields its decision-making power in several ways. Primarily, the agency responds to filings and requests from regulated companies or companies whose operations are affected by regulated companies. Examples of company-specific natural gas decisions, which number in the thousands annually, include:

- Authorization of a change in rates, terms and conditions of service of an interstate pipeline company,
- Certification of the building and operation of a natural gas pipeline,
- Certification of the construction and operation of natural gas storage facilities,
- Authorization of the siting of an LNG terminal,
- Approval of a request to abandon a facility or service,
- Resolution of a complaint filed by one company against another company, and
- Issuance of an order following an investigation of an alleged violation of the law.

FERC also makes decisions generically through the issuances of rules or regulations, which are preceded by notices seeking comments in proceedings called rulemakings (comparable to the EU's consultation process). (FERC regulations fill an entire volume of the Code of Federal Regulations – Title 18 – which is over 1200 pages long.) FERC has a long history of making generic or industry-wide decisions, in which it has shifted its policies significantly. For example, within the parameters of the original 1938 Natural Gas Act -- that is, with no new statutory authority -- the Commission opened up the interstate pipeline grid to third-party access in 1992. ^{19/} Moreover, the Commission informs its decisions through the issuances of policy statements. ^{20/} These statements do not have the effect of law; rather, they tell the public how the Commission would decide a certain matter, for example, the recovery of stranded costs, if and when a company requested such recovery. FERC may not, however, apply a policy as a regulation, but must compile an adequate record and provide a reasoned explanation in each case.

Whether making decisions through company-specific orders or generic rulemakings, FERC encourages, as it must by law, the participation of those potentially affected by its decisions. In turn, timely participation by these members of the public endows them with certain rights to challenge FERC decisions in the Federal courts. The requirements for participation are explicitly laid out in the FERC regulations.

There is one set of FERC "regulations" that require more discussion here. In certain areas of its jurisdiction, the Commission approves standards as opposed to crafting regulations. By way of background, a *standard* generally represents an established norm or requirement, usually a formal document that establishes uniform engineering or technical criteria, methods, processes and practices. They are frequently developed privately or unilaterally, for example, by a corporation,

^{19/} See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Order No. 636, FERC Stats. & Regs., Regulations Preambles [Jan. 1991-June 1996] ¶ 30,939 (Apr. 8, 1992).

^{20/} See, e.g., *Natural Gas Interchangeability*, Policy Statement on Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs, 115 FERC ¶ 61,325 (2007).

regulatory body, military, trade union, or an organization often with more diverse input, and adopted on a voluntary basis, becoming mandatory if approved by a government or pursuant to a business contract. The standardization process may be by edict or may involve the formal consensus of technical experts. In contrast, a *rule* generally comprises a principle or regulation governing conduct, action, procedure, or arrangement. A rule is adopted by government agencies through notice and comment rulemaking under the Administrative Procedure Act, and, as is true for most of FERC rules, is found in Code of Federal Regulations.

As relevant here, FERC approves standards for business practices of natural gas companies. The agency developed this approach in the aftermath of the institution of the natural gas open access program by industry consensus managed initially by the Gas Industry Standards Board and now by the North American Energy Standards Board (NAESB) to simplify and expand electronic communications, and to simplify and streamline business practices for a seamless marketplace for natural gas. The approach reflects input from all segments of the industry, using the American National Standards Institute (ANSI) process to develop standards covering, e.g., procedures for critical business practices such as, in the natural gas area, nominations; allocations, balancing, and measurement; invoicing; and capacity release and standardized mechanisms for electronic communication between the pipelines and those with whom they do business. Once that input has been received, NAESB files proposals with FERC, which then seeks public comment through notice and comment rulemaking. ^{21/} Once approved, the standards are found in the NAESB manuals and incorporated by reference in Title 18 of Code of Federal Regulation (section 284.12 for natural gas). They are enforced primarily through the audit process, and were implicated in several audits initiated in FY10 and FY11 by FERC audit staff. ^{22/} They have been implicated in only one investigation since 2005. ^{23/} The NAESB process represents one of true success stories of the agency (and the regulated industries), in part because the end result has not become bogged down in lengthy court cases. ^{24/}

Finally, with respect to FERC's decision making authority, FERC processes complaints, which can be initiated by a company or an individual under section 5 of the Natural Gas Act alleging, for example, that a pipeline company's rates are no longer just and reasonable or that the pipeline company is discriminating against unaffiliated shippers. The Commission pursues such complaints through either "paper hearings" or trial-type hearings, where interested parties may intervene and participate. Unless a case settles, the Commission will ultimately issue a decision on the merits based on the record. Once finalized, the decision, as is true for all decisions issued under the authority of the Natural Gas Act, is subject to review by a U.S. Court of Appeals.

D. Enforcement Power

Until the passage of the Energy Policy Act in 2005, FERC was primarily an economic regulator, with minimal enforcement authority. As already discussed, the agency mainly authorized certain transactions and activities, set rates, adjudicated claims, and issued rules. Its primary remedy for violations of its orders, rules, and regulations was ordering a company to disgorge its

^{21/} See, e.g., Standards for Business Practices of Interstate Natural Gas Pipelines, Order No. 587, 61 FR 39053 (July 26, 1996), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,038 (July 17, 1996).

^{22/} See, e.g., *ANR Pipeline Co.*, PA10-2-000 (Feb. 23, 2011) (delegated letter order).

^{23/} See *In re Northwestern Corp.*, 118 FERC ¶ 61,029 (2007).

^{24/} For more information on NAESB, see <http://www.naesb.org>.

profits from the unlawful activity. ^{25/} The agency also had the authority to refer matters to the U.S. Department of Justice for criminal prosecution, but rarely exercised that right. ^{26/} That situation changed dramatically with the enactment of the Energy Policy Act of 2005, which greatly enhanced the Commission's enforcement tools by providing, for the first time, civil penalty authority for violations of the Natural Gas Act and increasing the penalty authority for violations of the Natural Gas Policy Act -- up to one million dollars (U.S.) a day per violation for the duration of the violation. ^{27/} This expanded penalty authority also applies to *any* entity (not just a company traditionally subject to FERC jurisdiction) that manipulates wholesale natural gas markets by engaging in fraud or deceit in connection with jurisdictional transactions. Armed with this expanded authority, the Commission has attempted to create a strong and effective compliance and enforcement program to protect the public interest.

FERC exercises its enforcement authority using a three-pronged approach. First, as described earlier, the agency's staff actively monitors the natural gas and electric energy markets to discern any anomalies that cannot be explained by market fundamentals. To that end, the staff uses a plethora of data, including data it buys from outside vendors and also data that is supplied by regulated companies which are required to file forms and reports and post information on their web sites.

Second, FERC proactively seeks to ensure compliance with its orders, rules, and regulations by conducting audits of the companies it regulates. For example, in Fiscal Year (FY) 2009, FERC audit staff commenced 33 audits of public utilities and natural gas pipelines and storage companies, leading to 112 recommendations for corrective action, including \$2.8 million (U.S.) in monetary recoveries from accounting and billing adjustments. FERC found Southern Star Central Gas Pipeline failed to file material deviations from its *pro forma* service agreement, resulting in many other pipelines examining their situations to come into compliance with the gas open access rules. In FY10, FERC staff commenced 66 audits of companies' compliance with capacity release regulations, post-merger rules, financial form requirements, market based rate authorizations, electric quarterly reporting, pipeline posting requirements, NAESB standards, and Form No. 552 requirements. In FY11, FERC staff completed 56 audits of public utilities, natural gas pipelines, and storage companies, resulting in 300 recommendations for corrective action with respect to the companies' open access tariffs, postings, fuel cost recovery mechanisms, and financial reporting requirements.

Third, FERC investigative staff reacts to informal complaints or other sources of information about alleged violations of the Commission's statutes, orders, rules, and regulations. This information may come from a call to the Enforcement Hotline (hotline@ferc.gov or +1-877-337-2664), a self-report from a company, a referral from a market monitor in one of the six organized

^{25/} See *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986).

^{26/} The U.S. Department of Justice pursued some prosecutions on its own, e.g., the prosecution of Iroquois Natural Gas Pipeline for violating environmental conditions in its FERC certificate and the pursuit of Enron executives and natural gas traders for a variety of market-related violations at the start of the century.

^{27/} No other U.S. government agency has penalty authority greater than the FERC authority to impose million dollars a day penalties. Penalties are paid directly to the U.S. Treasury and do not offset the Commission's expenditures.

electric markets overseen by FERC (PJM Interconnection, New York Independent System Operator, Independent System Operator of New England, Midwest Independent System Operator, Southwest Power Pool Regional Transmission Organization, and the California Independent System Operator), a referral from the auditing or monitoring staff (housed along with the investigators in the Commission's Office of Enforcement), or a referral from another member of the FERC's staff. If the FERC investigators decide to pursue the allegation, they proceed under the process laid out in 18 C.F.R. Part 1b, and conduct the investigation in private. ^{28/} In other words, unlike the processing of complaints filed publicly, as described above, investigations are generally non-public and are not open to participation by interveners (*i.e.*, there are no "parties" in an investigation). ^{29/} Most investigations result in settlements. ^{30/} Several investigations involving market manipulation claims, however, have been set for hearing before an administrative law judge. ^{31/}

For all enforcement-related matters, FERC has emphasized the importance of compliance programs. In its 2008 Policy Statement on Compliance, the agency stated:

The Commission believes it is in the public interest to encourage companies subject to our regulatory requirements to develop rigorous compliance programs that will help minimize the potential for violations of applicable requirements, and to give significant weight to those programs when we determine whether to assess a civil penalty or other remedy for a violation. Achieving compliance, not assessing penalties, is the central goal of our enforcement efforts. Improved compliance as a result of a company's commitment to and successful implementation of a strong compliance program should result in fewer violations over time. In particular, improved compliance should result in a reduction of serious violations, that is, those violations that involve significant harm, risk of significant harm, or damage to the integrity of the Commission's regulatory program. ^[32/]

In the same order, the Commission set forth the four hallmarks of an effective compliance program: active engagement and leadership by senior management, effective preventive measures, prompt detection and cessation of violations and voluntary reporting of violations, and remediation of the misconduct. ^{33/} As a result of the Commission's focus on compliance, and the possible advantage of having an effective or "robust" compliance program, many if not most U.S. natural gas companies have expended considerable resources in developing such programs.

^{28/} FERC investigators have authority delegated to them by the Commission to exercise the Commission's prosecutorial discretion. See 18 C.F.R. § 375.311 (2010). Accordingly, they may decide not to pursue a particular allegation, or to terminate an investigation before final resolution. Notwithstanding this delegated authority, FERC investigators keep the Chairman and the Commissioners apprised of their decisions on a regular basis.

^{29/} In an extraordinary action, in January 2011, the Commission adopted a policy encouraging staff to disclose to the public the details of an enforcement investigation, including the name of the company being investigated, before consideration of the matter by the Commission. See *Enforcement of Statutes, Regulations, and Orders*, 134 FERC ¶ 61,054 (2011).

^{30/} Between August 2005 (the issuance of the Energy Policy Act) and December 2011, the Commission issued 52 orders approving settlements that involved \$ 155.02 million (U.S.) in EPAAct penalties.

^{31/} See, *e.g.*, *Amaranth Advisors, L.L.C.*, 124 FERC ¶ 61,050 (2008).

^{32/} *Compliance with Statutes, Regulations, and Orders*, Policy Statement on Compliance, 125 FERC ¶ 61,058 (2008) at P 1.

^{33/} See *id.* at P 13-21.

AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

I. Background: CEER and ERGEG

Understanding the formation of ACER requires a brief discussion of two organizations that represented Europe's national energy regulators at the EU level for over a decade: (1) the Council of European Energy Regulators (CEER) and (2) the European Regulators Group for Electricity and Gas (ERGEG). ^{34/} While both organizations shared the same Board of Directors and had almost identical memberships, ^{35/} they served distinct roles in the EU energy regulatory community and have unique histories.

CEER is a not-for-profit, independent, voluntary organization that was developed by European energy regulators in March 2000. Through CEER, European energy regulators seek to cooperate to "protect consumer interests and to facilitate the creation of a single, competitive, efficient and sustainable internal market for gas and electricity in Europe." ^{36/} Specifically, CEER acts as a platform for cooperation, information exchange and assistance between national energy regulators, and is their interface at European level with the European Commission, in particular the Directorate General Transport and Energy (DG TREN), DG Competition and DG for Research. It cooperates with the European Commission and competition authorities in order to ensure consistent application of competition law to the energy industry. CEER also strives to share regulatory experience worldwide through its links with similar associations in America (NARUC) and in Central/Eastern Europe (Energy Regulators Regional Association or ERRA) and its membership in the International Energy Regulation Network (IERN). Currently, the organization is comprised of energy regulators from the 27 EU Member States, as well as an energy regulator from both Iceland and Norway. ^{37/}

The European Commission established ERGEG in November 2003, as an advisory body on EU energy market issues. Before ACER, it served as the formal channel by which Europe's energy regulators communicated with and advised the European Commission on key energy market issues. ^{38/} The purpose of ERGEG was to "facilitate consultation, coordination and cooperation between the regulatory bodies in member States, and between these bodies and the Commission, with a view to consolidating the internal market and ensuring the consistent application in all Member States of Directives 2003/54/EC and 2003/55/EC and Regulation (EC) No 1228/2003." ^{39/} In particular, ERGEG focused on the creation of a unified EU energy market for electricity and gas that is competitive, efficient, and sustainable. To help guide the European Union towards an integrated

^{34/} See generally *2010 Annual Report of the European Energy Regulators*, available at http://www.energy-regulators.eu/portal/page/portal/EER_HOME/C10-WPDC-20-07_public%20WP2011_15-Dec-2010-Clean.pdf (last accessed June 1, 2011). [Hereinafter, 2010 Annual Report.]

^{35/} For example, Lord Mogg is currently the CEER President and, until recently, the ERGEG Chair. The Vice Presidents of ERGEG, who also managed the activities of CEER along with the President, included Walter Boltz, Carlo Crea, Johannes Kindler, Michel Thiollière, and Marek Woszczyk. See *European Energy Regulators, Presidency and Board*, available at http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_ABOUT/PRESIDENCY_BOARD (last accessed Dec. 1, 2011).

^{36/} See http://www.energy-regulators.eu/portal/page/portal/EER_HOME (last accessed Dec. 1, 2011).

^{37/} See http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_ABOUT (last accessed Dec. 1, 2011).

^{38/} See Decision 2003/796/EC (Nov. 11, 2003).

^{39/} *Id.*

energy market, in 2006, ERGEG spearheaded the “Regional Initiatives,” which established seven electricity and three regional gas markets in Europe. ^{40/} Those initiatives, however, were “based on voluntary cooperation, which somewhat hampered their ability to implement the agreed solutions.” ^{41/} At bottom, while ERGEG was effective in gathering data and making regulatory proposals, it could not adopt legally-binding decisions, had no enforcement authority, and made decisions purely by consensus. ^{42/} As some have observed, the “acknowledgement of these shortcomings became the basis for the creation of ACER.” ^{43/}

The European Commission signaled its intention to discontinue ERGEG once ACER assumed its full responsibilities and powers starting in March 2011, and accordingly dissolved ERGEG on July 1, 2011. ^{44/} Nevertheless, as explained later, ERGEG in effect has been incorporated into ACER as the Board of Regulators. The regulatory network, so to speak, has turned into a network agency or a “European network plus.” ^{45/} CEER will “continue to exist in Brussels, dealing with many complementary (and not overlapping) issues to ACER’s work such as international activity, smart grids, sustainability issues and customer issues.” ^{46/} In other words, CEER will be a means for Europe’s energy regulators to develop common interests that are of a pan-European or even wider significance but which do not fall within the current scope of ACER’s work. ^{47/} As ACER recognizes, “a consistent regulatory framework requires coordination of approaches in different areas and ACER and CEER will endeavor, working in parallel, to maintain close links in order to ensure such consistency in their respective areas of activities.” ^{48/}

II. Regulatory Authority

Energy regulators in Europe have played a central role in promoting the goals of The Third Legislative Package for the Liberalization of the Energy Markets (the 3rd Package), which was adopted by the Council of the 27 EU Member States on June 25, 2009, and published in the Official Journal of the European Union on August 14, 2009. The 3rd Package is a collection of five energy laws, composed of two Directives (2009/72/EC and 2009/73/EC) and three Regulations ((EC) Nos.

^{40/} See http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_ABOUT/ERGEG (last accessed June 1, 2011). See also 2010 Annual Report at 17-19.

^{41/} See 2011 Work Programme of the Agency for the Cooperation of Energy Regulators, at 3. [Hereinafter, 2011 ACER Work Programme.]

^{42/} See Leigh Hancher and Adrien de Hauteclocque, *Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice*, 11 *Competition and Regulation in Network Industries* (2010), No. 3, 307, 312. [Hereinafter Hancher and de Hauteclocque.]

^{43/} *Id.*

^{44/} See *European Energy Regulators’ News*, June 2011, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NEWSLETTERS/June%202011 [last accessed on July 11, 2011]. [Hereinafter *European Energy Regulators’ News*.]

^{45/} See Hancher and de Hauteclocque at 312-313, 318.

^{46/} See *European Energy Regulators’ News* at p. 1.

^{47/} See 2010 Annual Report at 4; 2012 Work Programme of the Agency for the Cooperation of Energy Regulators, at 34. [Hereinafter 2012 ACER Work Programme.] Illustratively, in the summer of 2011, CEER initiated public consultations on its vision of a European gas target model and a draft Guidelines of Good Practice (GGP) on retail market design; announced workshops on access to European LNG terminals and with academia on the gas target model; and published an amendment of the GGP for third party access for gas storage system operators.

^{48/} 2012 ACER Work Programme at 5

713/2009, 714/2009, and 715/2009) that aim to “put in place effective unbundling of vertically integrated energy utilities, to facilitate the delivery of massive energy investment that Europe crucially needs, and to improve the functioning of markets and customer rights.” ^{49/} Both the Electricity and Gas Directives were required to be transposed into law in each EU country within 18 months after their entry into force. ^{50/} In addition, under the 3rd Package, the national Transmission System Operators (TSOs) are required to develop two European Networks for Transmission System Operators (ENTSOs) by the end of 2011 -- one for the electricity industry, named ENTSO-E, and one for the gas industry, named ENTSO-G. ^{51/}

The 3rd Package also seeks to enhance the ability of energy regulators to work collaboratively on important issues for energy market integration with the creation of ACER -- a European Community body with “legal personality.” ^{52/} Accordingly, the 3rd Package recognizes that “voluntary cooperation between national regulatory authorities should now take place within a Community structure with clear competences and with the power to adopt individual regulatory decisions in a number of specific cases.” ^{53/} As most observers recognize, “[i]mplementation is much broader than mere transposition...” ^{54/} ACER is intended to be independent from the electricity and gas producers and the transmission and distribution system operators, allowing for unbiased yet informed recommendations and opinions on important energy market integration issues and cross-border disputes. ^{55/} Located in Ljubljana, Slovenia, the new agency became operational on March 3, 2011.

The Agency is generally responsible for issuing opinions and recommendations on energy market issues to transmission system operators, regulatory authorities, the European Parliament, the European Council, and the European Commission. The Agency has an Administrative Board (charged with governance), a Board of Regulators (consisting of the national regulatory authorities and one non-voting member representative of the European Commission), a Board of Appeal, and a Director (responsible for overall management). The European Parliament appoints two members of the nine-member Administrative Board, while the European Commission appoints two members, and the EU Council, which represents the EU’s 27 national governments, appoints five members. The Administrative Board then appoints the Director, who must be confirmed by the Board of Regulators.

^{49/} See 2010 Annual Report at 7. Regulations (as opposed to Directives) become effective immediately at the EU level after adoption by the Commission and the Council of the Member States without the obligation to be transposed into national legislation.

^{50/} Notwithstanding this directive, as of November 2011, almost half of the countries had not completed the transposition of the 3rd Package into national legislation.

^{51/} See 2010 Annual Report at 7. Prior to ACER’s commencement of operations, ERGEG had already developed an open and collaborative process for the development of Framework Guidelines, enabling a wide range of stakeholders to get involved in the development of Network Codes by way of expert groups, advisory groups, and public workshops. See European Energy Regulator’s News, May 2010, available at http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NEWSLETTERS/May%202010 (last accessed July 20, 2010).

^{52/} See Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ 2009 211/4. [Hereinafter, Regulation (EC) No 713/2009.] ACER is not unique. There are currently over thirty independent agencies operating at the EU level. See Groenleer at 8-9.

^{53/} See Regulation (EC) No 713/2009 at 1.

^{54/} Groenleer at 4.

^{55/} See Regulation (EC) No 713/2009 at 2.

56/ The agency is mainly financed from the general budget of the European Union, by fees and by voluntary contributions. 57/

In addition, ACER complements and coordinates the work of National Regulatory Authorities (NRAs). Its competences include making recommendations to assist regulatory authorities and market players in sharing good practices; providing a framework within which NRAs can cooperate; recommending to the European Commission binding rules to facilitate cooperation; and issuing (and following up on) opinions on requests by NRAs with respect to compliance with specific Directives and Regulations. ACER may also decide the terms and conditions for access to and operational security of interconnecting electricity and gas infrastructure, where the NRAs have not been able to reach an agreement within six months or upon request from the NRAs. 58/

Lastly, as is true for any regulatory agency, ACER's role may expand into other areas. For example, the scope of the 3rd Package may be significantly extended as the European Commission adopts technical regulations and guidelines on the basis of the "comitology" procedures, *i.e.*, using a committee of national government officials to approve new EU rules. 59/ Also, the agency's draft rules themselves may confer more responsibility on it. In addition, the European Commission indicated at the December 2009 European Electricity and Gas Regulatory Forum in Florence that ACER may play a role in overseeing measures to make wholesale markets more transparent. In that vein, in February 2011, the European Council adopted 2014 as the new target date for the completion of the Internal Energy Market (IEM) and 2015 as the date by which European "energy islands" should be interconnected to the European gas and electricity networks. In its conclusions, the Council emphasized the importance, for achieving these ambitious targets, of the cooperation of ACER with the NRAs for energy, as well as the transmission system operators through the ENTSOs. 60/ Some believe the Agency could even play a role in monitoring elements of the EU's future climate targets, such as trade in renewable energy certificates. 61/

III. Regulatory Responsibilities

ACER was established with the goal of creating "the institutional basis for the framework necessary to establish an integrated European grid in electricity and gas." 62/ More specifically, ACER is intended to provide a forum for national energy regulators to cooperate on cross-border energy market issues and develop guidelines to regulate the handling of cross-border disputes.

56/ *Id.* at 7-11. In early May 2010, the 27 national energy regulators met in Brussels for the first time as the ACER Board of Regulators. At that meeting, Lord Mogg, the current Chair of ERGEG and CEER, was elected Chair of ACER's Board of Regulators and Walter Boltz was elected as the Vice Chair. Alberto Pototschnig, formerly Chair and CEO of Mercados EMI Europe, was elected as the ACER Director. See 2010 Annual Report at 7. See also http://www.acer.europa.eu/portal/page/portal/ACER_HOME/The_Agency/Organisation/ACER_bodies (last accessed on Dec. 1, 2011).

57/ See Regulation (EC) No 713/2009 at 11-13. See also 2010 Annual Report at 7. The agency's annual budget is estimated to be € 7 million (\$9.5 million (U.S.)). See 2012 ACER Work Programme at 11, note 3.

58/ See Regulation (EC) No 713/2009 at 6-7. The ability of stakeholders to effectively challenge the new rules is presently unclear, and may depend on whether an action by ACER is considered a "legal act" by a court. See Hancher and de Hauteclocque at 320.

59/ See Groenleer at 4-7.

60/ See 2012 ACER Work Programme at 5.

61/ See Leigh Hancher, *New EU Regulatory Agency Readies for Action*, *Platts EU Energy*, Issue 227 (Feb. 26, 2010) at 13. [Hereinafter, Hancher.]

62/ See 2010 Annual Report at 4.

ACER is already intimately involved with the creation of these “Framework Guidelines” (which will be non-binding in nature) that will serve as the basis for new EU-wide Network Codes and will allow for a more integrated EU energy market. ^{63/} European regulators believe that “[t]hese EU-wide network codes are critical for an integrated EU energy market.” ^{64/} Despite having limited decision making powers with relatively scant enforcement capability, as now discussed, ACER is expected to help achieve EU energy market integration by employing its broad monitoring and advisory powers.

A. Monitoring Power

ACER is responsible for monitoring “regional cooperation between transmission system operators in the electricity and gas sectors,” as well as monitoring the work of ENTSO-E and ENTSG, to “ensure that the cooperation between transmission system operators proceeds in an efficient and transparent way for the benefit of the internal markets in electricity and natural gas.” ^{65/} ACER is also responsible for monitoring, in collaboration with the European Commission, the Member States, and the relevant national authorities, the internal gas and electricity markets across the European Union, and for advising the European Parliament, the Commission, and the NRAs. ^{66/} To that end, the Agency is currently working on its first annual report on the results of monitoring the internal electricity and natural gas markets, a project delayed due to limited resources during its start-up period. By the end of 2011, ACER expected to have developed data requirements and indicators for the monitoring exercises in the field, and has set a target date for publication of the assessment report on national reports in 2012. For this purpose, the Agency will work in close cooperation with the ACER Working Groups. ^{67/}

ACER is also responsible for monitoring the implementation of the EU-wide Network Codes, as well as the non-binding European Community “10-year Development Plan” and the European energy regulators “Annual Work Program.” If the Agency observes inconsistencies between development plans and their implementation, it can make recommendations on methods for improvement to the transmission system operators, national regulatory authorities or other competent bodies concerned. ^{68/} ACER anticipates providing its opinion and recommendations on the first EU-wide 10-year plan submitted by ENTSO-E and ENTSG by the end of 2012. ^{69/} In addition, ACER must monitor progress as regards the implementation of projects to create new interconnector capacity. ^{70/}

As a separate matter, in September 2011, the European Parliament and the Council adopted a Regulation on Energy Market Integrity and Transparency (REMIT). The legislation aims to create a framework protecting energy trading from market manipulation and insider trading. Also relevant here, a key element of the REMIT is that it grants ACER a coordination role (as well as extra staff and financial resources) for data collection, monitoring, and investigating market abuse at a cross-

^{63/} *Id.*

^{64/} *Id.* at 7.

^{65/} See Regulation (EC) No 713/2009 at 2.

^{66/} *Id.*

^{67/} See ACER 2012 Work Programme at 41-42. During 2011, a large part of ACER’s work was done by Regulators in “working groups” as initial staffing in Ljubljana was a challenge. The Agency did not reach its planned staff level of 40 permanent members and 10 “national dispatched experts” until September 2011.

^{68/} See Regulation (EC) No 713/2009 at 2.

^{69/} See 2012 ACER Work Programme at 6.

^{70/} See Regulation (EC) No 713/2009 at 5.

border level, and it grants additional investigative and enforcement powers to the NRAs. ^{71/} ACER anticipates that during 2012, the agency will start the process of implementing REMIT by getting ready to take on its monitoring functions. ^{72/}

B. Advisory Power

Because ACER has an overview of the national regulatory authorities, the Agency plays an advisory role for the European Commission, other Community institutions and NRAs as regards the issues relating to the purpose for which it was established, and is “required to inform the European Commission where it finds that the cooperation between transmission system operators does not produce the results which are needed or that a[n NRA] whose decision is not in compliance with the Guidelines does not implement the opinion, recommendation or decision of the Agency appropriately.” ^{73/} As noted, ACER is also responsible for advising on the development of Framework Guidelines that help guide the construction of the EU Network Codes. The ENTSOs submit draft network codes to ACER, which then has the opportunity to review the submissions before advising the European Commission on which codes to adopt. ^{74/} It is “considered appropriate for the Agency . . . to have a role in reviewing network codes (both when created and upon modification) to ensure that they are in line with the framework guidelines.” ^{75/} However, although the “agency can provide options to ENTSOE, ENTSG and the EC on these codes, development plans and the work programs . . . , [t]he EC has the final word” on which network codes will become binding. ^{76/} As described by one academic,

Given that the agency only advises the [European Commission (“EC”)], it cannot arbitrate between conflicting public interests or make political choices or conduct complex economic assessments on the merits of one particular investment project as opposed to another. This is the EC’s task. The EC sets the annual priorities for the network codes and takes the final decision on whether they will become legally binding. The agency is definitely consigned to the back seat. ^[77/]

Nevertheless, as a practical matter, the European Commission would likely be inclined to agree with ACER’s advice and recommendations in light of the extensive stakeholder participation and iterative process contemplated by Articles 6 and 10 of the Regulation. ^{78/} In other words, “rather than by formal authority,” ACER like other EU agencies may be able to “regulate by information.” ^{79/} Thus, ACER may “gain significant influence (as distinct from formal powers) if the [European] Commission generally complies with its opinions, which resorts to a sort of ‘soft law’ approach.” ^{80/}

Illustratively, at the request of the European Commission to act “as if” it were ACER while the new agency was being established, ERGEG initiated three proceedings to develop non-binding framework guidelines in the natural gas area regarding (1) gas capacity allocation mechanism, (2) gas balancing, and (3) harmonized gas transmission tariff structures. For its part, ACER believes

^{71/} See 2012 ACER Work Programme at 6. REMIT may require as many as 25 additional ACER staff members.

^{72/} *Id.* at 6.

^{73/} See Regulation (EC) No 713/2009 at 21.

^{74/} See Hancher at 12.

^{75/} See Regulation (EC) No 713/2009 at 2.

^{76/} See Hancher at 12.

^{77/} *Id.*

^{78/} See Regulation (EC) No 713/2009 at 5, 7.

^{79/} See Groenleer at 10 (internal quotation marks and citation omitted).

^{80/} Hancher and de Hauteclouque at 317.

that it will be able to issue opinions on Network Codes on Capacity Allocation Mechanisms and Gas Balancing in 2012. The Agency also expects to complete work at the same time on Framework Guidelines on Interoperability of Gas Systems, Framework Guidelines on the Rules for Trading, and Framework Guidelines on Data Exchange and Settlement Rules. ^{81/} In this process, as was the practice of ERGEG previously, ACER must consult “extensively and at an early stage” with market participants, transmission system operators, consumers, end-users and, where relevant, competition authorities in an open and transparent manner. ^{82/}

C. Decision Making Power

Despite having substantial monitoring and advisory responsibilities, ACER has limited decision making power, which is generally relegated to influencing the regulatory regime for cross-border trade involving transmission systems located in more than one Member State or involving more than one Member State where no joint agreement has been reached by the responsible NRAs. As described by its Director, “[e]ven though ACER has at present little decision-making powers, it can nonetheless play an important role in . . . assisting NRAs in exercising, at community level, the regulatory functions performed in Member States and, where necessary, with coordinating their actions.” ^{83/} Specifically, with respect to cross-border infrastructure, ACER has been tasked with deciding those regulatory issues that fall within the competence of the NRAs, which may include the terms and conditions for access and operational security, but only where (1) the competent authorities have not been able to reach an agreement within a period of six months from when the case was referred to the last of those authorities, or upon a joint request from the competent NRAs. ^{84/} The Agency must render a decision within six months from the day of referral, although it may issue an interim decision to ensure that security of supply or operational security is protected. ^{85/} Also, the Agency may decide on exemptions where the infrastructure concerned is located in the territory of more than one member state. ^{86/}

Where the Agency has decision making power, e.g., with respect to a cross-border dispute, parties have a right of appeal to the ACER Board of Appeal that is independent from its administrative and regulatory structure. ^{87/} The decision of the Board of Appeal may then be subject to appeal before the Court of First Instance or the Court of Justice of the European Communities. ^{88/} More to the point, with respect to its decision making power, an Agency decision can be amended or vetoed by the European Commission, further limiting ACER’s power and upholding the notion that strict conditions should dictate when power can be transferred to independent agencies. ^{89/}

^{81/} See 2011 ACER Work Programme at 39-41.

^{82/} See 2012 ACER Work Programme at 32 quoting from Article 10(1) of Regulation (EC) No 712/2009.

^{83/} See 2011 ACER Work Programme at 3.

^{84/} See Regulation (EC) No 713/2009 at 6. Such terms and conditions include a procedure for capacity allocation, a time frame for allocation, shared congestion revenues, and the levying of charges on the users of the infrastructure.

^{85/} *Id.*

^{86/} *Id.* at 7. Understandably, the Agency issued few decisions or rules in its startup period. Through June 2011, the Administrative Board issued only 27 decisions and adopted five implementing rules. See 2011 ACER Work Programme at 13.

^{87/} See Regulation (EC) No 713/2009 at 3, 11.

^{88/} *Id.*

^{89/} See Hancher at 12. A 1958 ruling from the European Courts, known as the “Meroni” doctrine, calls for strict conditions to be set on what powers can be transferred to independent agencies. In brief, the doctrine provides that the European Commission cannot delegate to an agency powers it itself does not possess. See Hancher and de Hauteclocque at 318.

Therefore, in essence, the European Commission has the final word even on major cross-border issues. Nevertheless, ACER's role to resolve disputes on cross-border investments in the first instance could provide an "effective solution to the risk of delay, particularly where potentially high costs are involved. Where further rules or guidelines are needed, existing tools, such as framework guidelines and network codes, [are anticipated to] provide a practical means to take this forward."
90/

D. Enforcement Power

ACER's monitoring and advisory powers do not extend into compliance and enforcement, although under certain circumstances, where an NRA does not comply with the opinion of the Agency, the Agency must inform the European Commission and the Member State accordingly. 91/ For the most part, the Agency cannot arbitrate between conflicting public interests or make political decisions, which are tasks left to the European Commission. 92/

COMPARISON OF FERC AND ACER 93/

FERC and ACER are both government agencies created by a legislature, charged with a mission, and empowered with a mandate. Structurally, the two agencies are comparable in the sense that their policy members are selected by other political bodies that represent a balance of power within their respective jurisdictions. FERC Commissioners are nominated by the President and confirmed by the U.S. Senate; ACER Administrative Board Members are selected by the Parliament, European Commission, and Council. FERC is accountable (through the budget appropriations process) to the U.S. Congress; ACER is accountable to the European Parliament, the Council, and the European Commission, as appropriate. Both agencies are also required to operate independently from members of the regulated industries.

FERC and ACER are not similar with respect to the derivation of their authority and review of their actions. FERC's authority is directly delegated to the agency by the U.S. Congress, which can extensively empower (and has empowered) the Commission to take action in regard to wholesale and interstate natural gas business. The legislative mandate is only limited by the U.S. Constitution. ACER's authority, on the other hand, is indirectly delegated to the agency by the Parliament and Council, and directly delegated by the European Commission, which under the "Meroni" doctrine cannot give the agency more authority than it has itself. Also, FERC's decisions are unquestionably reviewable by a court of law, whereas the extent to which stakeholders will be able to challenge ACER decisions beyond the Board of Appeal is unclear at this time.

FERC and ACER are not comparable in their size. FERC has five policy members and approximately 1,500 professional staff, while ACER has 32 policy members and approximately 50 professional staff. ACER's budget is a fraction of FERC's budget. Also, the decision makers' required commitment of time is different. FERC commissioners are by law foreclosed from working elsewhere, even for another government agency, whereas ACER Board Members are not full-time

90/ See 2010 Annual Report at 13-14.

91/ See Regulation (EC) No 713/2009 at 6. The Regulation, however, does not indicate what remedies might be available for the failure of the NRA to comply with the Agency's opinion.

92/ See Hancher at 13.

93/ This comparison focuses on FERC's and ACER's wholesale and interstate/international regulatory oversight. A comparable comparison cannot be made with respect to retail, local regulatory oversight as there is no nation-wide energy regulatory agency or authority in the United States with power over state and local matters. A comparison can be made between NARUC and CEER as both are voluntary organizations of retail regulators, who collaborate and confer on local matters but whose authority to take action is confined to the jurisdictions of their respective members.

employees of the Agency and the members of the Board of Regulators by definition work at other agencies. (During ACER's start-up period, the Regulators appeared to have played a significant role in the work of the agency by their participation in Working Groups.) In addition, while FERC has an executive director, the FERC Chairman is the chief administrative officer of the Commission. The executive director only handles administrative (e.g., personnel, procurement, IT) matters and does not become involved in substantive or policy issues. By contrast, ACER's Director appears to have a significant role in directing the substantive activities of the agency's staff, and is its legal representative and public face.

FERC's and ACER's missions are similar – well functioning energy markets achieved through a balance between competition and regulation. Both agencies are governed by laws, directives, and rules that promote access to monopoly facilities and allow competition to work where possible. The scope of their mandates, however, differs significantly. To start with, FERC is tasked with ensuring a uniform national natural gas program for wholesale sales and interstate transportation, but it has no authority to coordinate or otherwise direct the activities of the 50 state commissions responsible for retail sales and local distribution. ACER, on the other hand, is explicitly charged with providing a framework within which the 27 NRAs, which are responsible for wholesale *and* retail operations, can cooperate. Also, FERC plays a lesser advisory role than ACER, although that is counterbalanced by its ability to take action, *i.e.*, it does not need to advise when it can act on its own accord. Still, ACER's advice to the European Commission, e.g., with respect to network codes, may become tantamount to a decision. Put another way, ACER may ultimately “regulate by advice.” The route that ACER will be required to take, however, will be more complicated and circuitous than the road FERC follows to ensure consistent and consistently applied rules for the wholesale sale and interstate transportation of natural gas.

Both agencies perform similar monitoring tasks, inasmuch as they monitor compliance with existing rules, although they employ different remedies for non-compliance. FERC has explicit enforcement authority that significantly exceeds ACER's authority, which is confined to advising the European Commission on appropriate action to consider. Moreover, FERC has taken on the responsibility, without explicit legislative direction, to monitor energy markets to discern any anomalies that require further investigation, and created a Market Monitoring Center for that purpose. Also, in this regard, FERC currently has more authority to obtain data from the companies it regulates to facilitate transparency in those markets to police against market manipulation and market abuse, and also has a Memorandum of Understanding with the Commodity Futures Trading Commission for sharing information. That difference may fade, however, depending on the implementation of the REMIT.

FERC's and ACER's approaches to establishing network codes are also similar, although not identical. In the USA, the natural gas industry develops standards through an iterative, consultative process developed by the American National Standards Institute (ANSI) and overseen by the North American Energy Standards Board (NAESB), which then submits proposed business standards, e.g., regarding uniform gas sales contracts or communication protocols between gas pipeline companies and electric generators, to FERC for review and approval. FERC in turn seeks comments from the public before adoption of any standards that will then become mandatory across the country and enforceable by FERC. Comparably, ACER (or ERGEG on behalf of ACER during ACER's start-up period) develops guidelines for the development of EU-wide principles for network codes on specific topics such as capacity allocation and gas balancing. Unlike FERC, ACER then comments on the draft of the codes prepared by ENTSOG (the network operators) on the basis of these guidelines and submits them to the European Commission, which has final approval authority to make them binding through a procedure called “comitology,” *i.e.*, using a committee of national government officials to approve new EU rules. Seemingly, too, the NRAs, not ACER, are then responsible for the TSOs' compliance with those network codes. For its part, FERC unquestionably oversees compliance by the interstate natural gas pipelines with its rules, codes, and standards.

The major difference between the two agencies involves the scope of their decision making authority and especially their power to enforce the law.

FERC is a licensing agency, whereas ACER is not. Accordingly, FERC certifies and sets the rates and terms and conditions of service for new pipeline facilities that move natural gas across state lines. If it finds the construction to be “required by the public convenience and necessity,” and is environmentally acceptable, FERC disposes of local opposition and provides the company with the right to condemn the property along the route, if needed. While ACER does not have licensing authority comparable to FERC’s, it can nevertheless influence the operation of TSOs that cross national boundaries and, where the infrastructure concerned is located in the territory of more than one Member State, resolve conflicts on terms and conditions for access to and operational security of cross-border infrastructure and decide on exemptions. It does not, however, have the authority in the first instance that FERC has to set uniform, pan-national commodity or transmission rates or terms and conditions of service.

Both agencies are required by law to seek the opinion and views of the public on actions they propose to take. Participation in FERC proceedings, however, is governed by a defined set of requirements and appears to provide greater assurance than does ACER’s practice for appealing or other challenging agency actions.

The starkest contrast between FERC and ACER is the power of the respective agencies to enforce the laws. In 2005, FERC received impressive authority to enforce violation of its statutes, orders, rules, and regulations, and to police against market manipulation. The Commission can pursue such violations on its own, in administrative proceedings held at the agency or in a court of law, without involving other agencies, such as the U.S. Department of Justice that is the USA’s primary enforcer of anti-trust violations. (FERC cannot pursue any criminal prosecutions, however, but must refer such matters to the U.S. Department of Justice. This has rarely happened.) ACER, on the other hand, does not have comparable authority, although few if any of the NRAs have that authority either. Rather, as a general matter, they must turn their prosecutions over to competition authorities. What is unknown at this time, however, is the impact of the implementation of REMIT on ACER’s and the NRAs’ enforcement authority.

In conclusion, American Federalism has bifurcated regulation of natural gas companies. Because the U.S. Congress may not direct state regulators to act, the USA has a uniform national policy resulting from a single, powerful Federal agency with jurisdiction over wholesale and interstate transactions and an uneven pattern resulting from 50 individual states’ jurisdiction over intrastate and local transactions. Conversely, the European Union of Member States has produced singular regulatory oversight of natural gas companies operating at the wholesale and retail levels, within a country and across country borders. Because the European Union Parliament and Council can issue directives that must be transposed consistently by member states, it has theoretically laid the basis for a uniform pan-national energy policy – over wholesale and retail, international and local. That uniformity has not yet been realized, however, and its ultimate realization may be difficult given the different historical backgrounds and regulatory traditions of the member states. Nevertheless, the European Union has embarked on creating a pan-national organization to that end, an organization that has a few of the characteristics of the American Federal agency, but for now without comparable decisional or enforcement authority. At bottom, FERC’s primary role is regulation where ACER’s primary role – at present – is coordination. So, one asks, is ACER ERGEG-plus or FERC-lite? Regardless of the answer, natural gas companies affected by the regulatory oversight in both jurisdictions should closely follow the developments at these agencies as well as the agencies at the state (in the USA) and national (in the EU) levels, to understand and be in a position to respond to any cross-pollination of policies between and among them.