



## Is ACER FERC-lite?

By Susan J. Court

**This article compares two “interstate” regulatory agencies with significant oversight of the natural gas industry, one of the study topics of IGU’s Programme Committee B – Strategy. It is extracted from a paper prepared by Susan J. Court, for and with the assistance of members of PGC B’s Study Group B.3.**

Until recently, there was no energy regulatory agency in the European Union (EU) with authority comparable to the authority of the Federal Energy Regulatory Commission (FERC or Commission) in the USA to oversee “inter-member-state” or pan-national energy companies and transactions. That partially changed in June 2009, with the passage of the Third Legislative Package for the Liberalisation of the Energy Markets, which created the Agency for the Cooperation of Energy Regulators (ACER or the Agency). Operational since March 2010, ACER is still in the initial stage of its establishment, but has a legal structure and level of activity sufficient to allow a comparison of the two agencies with respect to their regulatory authority and regulatory responsibilities, including their monitoring, advisory, decision-making and enforcement powers.

By way of background, while the USA and the EU are both politically grounded in representative government, US Federalism differs significantly from the legal position of EU Member States, a difference that affects the regulation of natural gas companies and transactions in the two jurisdictions. Specifically, the US Constitution and the laws enacted by the US 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 Commission and reserve authority to and responsibility for the second to public service com-

missions 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 does not make that distinction and gives authority to and responsibility for wholesale, retail and internal transactions to the regulatory authorities in the individual 27 member countries. 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 harmonised and promote cross-border consistency. For a variety of reasons, however, those laws have not been evenly implemented across the EU, a situation that led to the creation of ACER.

### ● Comparing the agencies

A comparison between FERC and ACER must begin with the basics. Both are 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 US President and confirmed by the US Senate; ACER Administrative Board Members are selected by the Parliament, European Commission and Council. FERC is accountable (through the budget appropriations process) to the US 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 US 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 US 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 employees



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ACER's Director Alberto Potoschnig (second left) is pictured with Slovenia's Prime Minister, Borut Pahor (centre) at the opening of ACER's headquarters in Ljubljana in March 2011.

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 programme 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 National Regulatory Authorities (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 Regulation on Energy Market Integrity and Transparency (REMIT), adopted in September 2011, by the European Parliament and the Council. This legislation aims to create a framework protecting energy trading from market manipulation and insider trading. 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-border level, and it grants additional investigative and enforcement powers to the NRAs. ACER anticipates that during 2012, the agency will start the process of implementing REMIT by getting ready to take on its monitoring functions.

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 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 the European Network for Transmission System Operators for Gas (ENTSOG) 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 Transmission System Operators' compliance with those network codes. For its part, FERC unquestionably oversees compliance by the interstate natural gas pipelines with its rules, codes and standards.

### ● Differences

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



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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, including \$1 million per day/per violation penalty authority, to enforce violations 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 US Department of Justice (the USA's primary enforcer of anti-trust violations). (FERC cannot pursue any criminal prosecutions, however; such matters must be referred to the US 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.

### ● Conclusion

In conclusion, American Federalism has bifurcated regulation of natural gas companies. Because the US 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 trans-

actions 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 EU 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 realised, however, and its ultimate realisation 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 organisation to that end, an organisation 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 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.

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