NORTH AMERICAN ENERGY STANDARDS BOARD: LEGAL AND ADMINISTRATIVE UNDERPINNINGS OF A CONSENSUS BASED ORGANIZATION

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I. INTRODUCTION

The Gas Industry Standards Board (GISB), formed by the wholesale natural gas industry in 1992, has expanded its charter to include the voluntary development of consensus-based business practice standards for the wholesale electric industry as well as the retail natural gas and electric industries. The new organization, called the North American Energy Standards Board (NAESB), was formed in 2002 based on many of the same successful principles developed and refined by the GISB. Although the standards developed are intended to be voluntary, the regulatory community, most notably the U.S. Federal Energy Regulatory Commission (FERC or Commission), has adopted them by reference into their regulatory framework thereby making the standards mandatory for the entities under their jurisdiction.

This article will review the history behind the formation of the GISB and its evolution into the NAESB and describe the organization's procedures. We will then discuss the constitutional and statutory considerations relating to a regulatory agency's delegation of certain responsibilities to voluntary industry organizations. Unlike previous articles published in the Energy Law Journal, this one will conclude that regulatory agencies in general, and the FERC in particular, have not delegated authority to the NAESB. Rather, this article will go on to examine the statutory and regulatory underpinnings that permit a regulatory agency to incorporate by reference copyrighted industry developed standards into its regulatory framework.

This method, and not complete delegation of authority to private bodies, has become the preferred means for a regulatory agency to encapsulate industry consensus standards in developing uniform and enforceable regulations. We conclude that incorporation by reference works best where the groups setting industry standards are truly representative of the many segments in the industry and the standards are the product of a consensus-based process. Accordingly, we turn first to the formation and structure of the GISB and the NAESB, and their procedures for standards development.

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II. THE TRANSFORMATION OF THE GISB INTO THE NAESB

A. *Formation and Structure of the GISB*

Although the GISB received its charter in 1994,[1] the effort to establish the organization actually began in 1992, when the FERC issued Order 636.[2] In that order, the FERC required interstate pipelines to post various information about capacity on their systems, including service available through capacity-release transactions and firm and interruptible capacity available directly from the pipelines, on electronic bulletin boards (EBBs). In September of the same year, the FERC and the U.S. Department of Energy (DOE) issued a joint report recommending the adoption of standard electronic data interchange (EDI) protocols, the standardization of pipeline electronic bulletin boards, and other measures designed to improve the accuracy and timeliness of natural gas deliverability data to the marketplace.[3]

This led the industry to begin discussions on how electronic communications systems would work in the fast-developing marketplace for natural gas. In 1993, five working groups were established to iron out the details of implementing EBBs. The groups operated under FERC auspices, with participation by FERC staff and representatives of all segments of the gas industry. The working groups resolved a number of technical issues, including an agreement to base gas industry standards on the already established EDI protocols. The FERC issued Order 563 accepting the reports of the working groups with minor modifications.[4] The separate discussions begun by the Natural Gas Council (NGC) and the FERC—which frequently involved the same industry participants—led to the general acceptance of the concept of a permanent board to develop and maintain voluntary standards for electronic information exchange and electronic communications necessary to promote reliable gas service. By April 1994, the working groups consolidated into one

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1. The GISB was incorporated as a non-profit, non-stock Delaware corporation on September 26, 1994. The GISB Bylaws were adopted by the Board of Directors at its meeting on October 12, 1994. N. Am. Energy Standards Bd., *GISB Governance Documents*, *available at* http://www.naesb.org/materials/gisb_gov.asp (last visited Feb. 12, 2006); GAS INDUS. STANDARDS BD., INC., BYLAWS OF GAS INDUSTRY STANDARDS BOARD (1998) [hereinafter GISB BYLAWS]; GAS INDUS. STANDARDS BD., INC., CERTIFICATE OF AMENDMENT OF CERTIFICATE OF INCORPORATION OF GAS INDUSTRY STANDARDS BOARD, INC. (1998) [hereinafter GISB CERTIFICATE OF INCORPORATION].

2. Order No. 636-A, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, F.E.R.C. STATS. & REGS. ¶ 30,950, at p. 30,522, 57 Fed. Reg. 36,128 (1992), *order on reh'g*, Order No. 636-B, *Order Denying Rehearing and Clarifying Order Nos. 636 and 636-A*, 61 F.E.R.C. ¶ 61,272 (1992), Notice of Denial of rehearing, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 62 F.E.R.C. ¶ 61,007 (1993), *aff'd*, United Distribution Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996).

3. U.S. DEPT. OF ENERGY AND U.S. FED. ENERGY REG. COMM'N, NATURAL GAS DELIVERABILITY TASK FORCE REPORT (1992) (DOE/FE-0258P) (on file with the authors).

4. Order No. 563, *Standards for Electronic Bulletin Boards Required Under Part 284 of the Commission's Regulations*, F.E.R.C. STATS. & REGS. ¶ 30, 988, 59 Fed. Reg. 516 (1994) [hereinafter Order No. 563], *order on reh'g*, Order No. 563-A, F.E.R.C. STATS. & REGS. ¶ 30,994, 59 Fed. Reg. 23,624 (1994) [hereinafter Order No. 563-A], *reh'g denied*, Order No. 563-B, 68 F.E.R.C. ¶ 61,002, *order accepting modifications*, Order No. 563-C, 68 F.E.R.C. ¶ 61,362 (1994), *order modifying capacity*, Order No. 563-D, 69 F.E.R.C. ¶ 61,418, *order on clarification*, Order No. 563-E, 70 F.E.R.C. ¶ 61,188 (1995).

combined group with the mission of continuing to develop and test natural gas standards for the pipelines.[5]

Around the same time as the meetings on EBBs, the DOE called for the development of a natural gas standards board, and a series of open discussions on standards issues were initiated by the NGC, an industry organization founded by the American Gas Association (AGA),[6] the Independent Petroleum Association of America (IPAA),[7] the Natural Gas Supply Association (NGSA),[8] and the Interstate Natural Gas Association of America (INGAA).[9]

The GISB was not the first gas industry effort on electronic information standards. During its developmental stages the organization drew heavily on the experiences of those who had participated in the American National Standards Institute's (ANSI)[10] gas quality and measurement standards effort, the American Petroleum Institute (API)[11] and AGA committees that had worked on pipeline tariff issues, GAS*FLOW,[12] and the Council of Petroleum Accounting Societies (COPAS).[13] The nascent organization also received support from standards advocates outside the gas industry. The DOE's Domestic Oil and Gas Initiative, for instance, acknowledged the GISB's importance to the industry.[14] In addition, the White House Office of Management and Budget encouraged all federal

5. Order No. 563-A, *supra* note 4, at p. 31,050. This group did not always make sufficient progress to convince the FERC that it was moving rapidly enough. Eventually, at the insistence of then Chair Betsy Moler, the Commissioners convened a public meeting where the working group was strongly encouraged to conclude their discussions and adopt procedures quickly, lest the FERC would do it for them. This injunction was taken seriously and the group soon resolved its remaining issues.

6. The American Gas Association represents 195 local energy utility companies delivering natural gas to residential and industrial end-users. American Gas Association, http://www.aga.org (last visited Feb. 12, 2006).

7. The Independent Petroleum Association of America represents thousands of independent oil and natural gas producers, as well as, service companies. Independent Petroleum Association, http://www.ipaa.org (last visited Feb. 12, 2006).

8. The Natural Gas Supply Association represents the larger affiliated natural gas producers and marketers. Natural Gas Supply Association, http://www.ngsa.org (last visited Feb. 12, 2006).

9. The Interstate Natural Gas Association of America represents the interstate natural gas pipeline industry. Interstate Natural Gas Association of America, http://www.ingaa.org (last visited Feb. 12, 2006).

10. The American National Standards Institute is a private, non-profit organization formed in 1918 that administers and coordinates the United States voluntary standardization and conformity assessment system. The ANSI facilitates the development of American National Standards by accrediting the procedures of standards developing organizations (SDO). Accreditation by the ANSI signifies that the procedures used by the SDO in connection with the development of standards meet the ANSI's essential requirements for openness, balance, consensus, and due process. The NAESB is one of about 200 organizations accredited as a SDO by the ANSI. American National Standards Institute, http://www.ansi.org (last visited Feb. 12, 2006).

11. The American Petroleum Institute represents the following segments of the natural gas and petroleum industry: exploration and production, marine transportation, pipeline, refining, marketing, lubricant and fuel producers, service companies, supply companies, fertilizer manufacturers, and other companies relying on hydrocarbons as feedstock for their manufacturing process. American Petroleum Institute, http://www.api.org (last visited Feb. 12, 2006).

12. GAS*FLOW was an ad hoc organization formed for the purpose of developing electronic data interchange standards for the natural gas industry. The GISB subsequently absorbed the work of GAS*FLOW and its standards.

13. The Council of Petroleum Accounting Societies represents individuals and organizations dedicated to developing energy accounting guidelines, model form interpretations, best practices, training, and reference publications for the natural gas and petroleum industries. Council of Petroleum Accounting Societies, http://www.copas.org (last visited Feb. 12, 2006).

14. U.S. DEP'T OF ENERGY, THE DOMESTIC NATURAL GAS AND OIL INITIATIVE: ENERGY LEADERSHIP IN THE WORLD ECONOMY § 3.3 (1993).

agencies to reduce their cost of developing national standards through the incorporation into regulations of privately developed standards where such standards were consistent with the public interest.[15]

Mindful of the gas industry's history of divisiveness among its various segments, the GISB's founders carefully crafted a membership-driven organizational structure that ensured that even the smallest interest groups (segments) in the industry received a voice, and a place at the table while protecting the largest segments when make-or-break issues arose for them. To ensure that all of the gas industry's business segments were represented, five GISB membership categories, called "segments" were established: LDCs (local distribution companies or utilities), service providers (marketers, financial services companies, consultants, law firms, software developers, and other similar businesses), producers, pipelines, and end-users.[16]

The organization had two governing bodies: a Board of Directors (the Board), with responsibility for approving the budget, initiating and recommending charter changes, and maintaining contacts with the industry and government agencies; and the Executive Committee (EC), which was given the responsibility for developing the standards themselves.[17] Five seats in each body were allocated to each of the five segments. The GISB's balanced voting rules ensured that all decisions were the result of a genuine industry consensus. In order for a standard to be adopted, amended or rescinded, it must have received an affirmative vote of 67% of the EC members, and at least 40% of the EC members in each segment.[18] This balanced voting method permitted a unified industry segment to stop the passage of any standard a majority felt was adverse to their segment's best interest. If it passed the EC vote, a standard had to be ratified by 90% of the GISB's members before it became a final GISB standard. This structure helped the GISB achieve consensus on numerous difficult issues, greatly decreasing the rivalries and disagreements that characterized the natural gas industry prior to the GISB's founding.

The GISB was also committed to openness and the broadest possible participation. All meetings were open to the public,[19] and allowed for participation telephonically or by the submission of written comments. Moreover, while the GISB's dues were intentionally kept at a reasonable level, even non-members were permitted to propose and comment on prospective standards. Indeed, non-members regularly participated and voted as members of standards development subcommittees and task forces. The only time non-members could not vote was when the EC was taking final action on a standard.

Prior to EC action, every recommended standard developed by an EC subcommittee was required to go out for a thirty-day industry comment period. This openness resulted in the participation of hundreds of volunteers from the

15. OFFICE OF MGMT. & BUDGET, REVISION OF OMB CIRCULAR NO. A-119, NOTICE OF IMPLEMENTATION, 58 Fed. Reg. 57,643 (1993). *See* discussion *infra* Section III.B.1.

16. GISB CERTIFICATE OF INCORPORATION, *supra* note 1.

17. The GISB also formed a permanent Advisory Council comprised of representatives of federal, state, and local agencies; public interest groups; non-profit research organizations; and similar entities for the purpose of advising the Board and the EC. GISB CERTIFICATE OF INCORPORATION, *supra* note 1, at Art. III § 8. Provision for an Advisory Council was continued with the formation of the NAESB.

18. *Id.* at Art. V § 4.

19. GISB BYLAWS, *supra* note 1, at § 2.2.

industry. All work papers, agendas, and meeting announcements were publicly available on the GISB web site.

The GISB's charter forbade the organization from engaging in advocacy before regulatory agencies.[20] The rule banning advocacy permitted the organization to be an honest broker, resolving conflicts over how business processes that involve the entire industry should be standardized. Whether these conflicts were within segments, between segments or across the entire membership, the GISB's procedures helped the organization achieve agreement and consensus. In addition, so that the FERC would be aware of the process leading up to adoption of a standard, the GISB routinely provided a full set of its work papers and a transcript of its proceedings to the FERC. Any advocacy thus came from the persons staking out discrete positions rather than the organization itself.

The GISB's organizational structure, governance process, defined voting for decision making, and avoidance of advocacy before regulatory bodies, made the organization effective in addressing controversial standardization issues through a broad-based cross industry mechanism. The GISB provided the ability for all interests to be involved in the standards making process with an equal voice, which produced a strong work product widely accepted in the industry.

B. The Emergence of Electric Deregulation and Retail Markets

In the mid- to late-1990's there was a major philosophical and regulatory push to move the energy industry in the direction of retail deregulation. This ultimately had implications for the GISB's structure and focus.

In 1999, the nation-wide policy of retail energy deregulation was at its zenith. One response to this was the formation of the Coalition for Uniform Business Rules (CUBR) in April 1999. The CUBR was formed to address areas where minimum uniform business rules could be adopted to facilitate the development of competitive retail natural gas and electricity markets and significantly reduce the barriers to entry for competitive service providers. Through standardization across state borders, the CUBR also sought to, reduce transaction costs, improve communications between market participants, enable the freer movement of capital, goods and services, and allow suppliers to reduce prices and create innovative products and services. The ad hoc organization was made up of representatives from natural gas and electric marketers, utilities, meter service providers, meter data management agents, billing and collection companies, software vendors, and other mid and back-office service providers. Absent from the CUBR coalition were representatives of the end-users or customer segment.

After holding meetings and conference calls at least twice a month, the CUBR released a detailed set of uniform business rules that addressed ten issues important to retail deregulation. It subsequently, in December 1999, released standard electronic transaction implementation guides and data dictionaries to support its uniform business rules. As an ad hoc coalition, however, there was no provision for the CUBR to maintain and update its body of work.

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20. The Certificate provides, "GISB shall not have any formal relationship with any regulatory agency. GISB shall not have an advocacy role regarding its standards before the FERC or any other regulatory agency." GISB CERTIFICATE OF INCORPORATION, *supra* note 1, at Art. II § 4.

Neither of the CUBR reports were submitted to the GISB for adoption as GISB standards, however the group's efforts were the basis for a push within the GISB to restructure its activities to accommodate some retail activities. Initially, there was resistance from the wholesale sectors that comprised the GISB to embarking upon such a fundamental change in focus. Nevertheless a task force was formed by the GISB board to consider the matter and make recommendations for the board's review and consideration. As with the formation of the GISB itself, reaction ranged from limited interest through "armed neutrality" to moderate hostility. The main concern of the GISB board members was that the principal (and very effective) goals of the organization not be diluted by diversification into the retail arena. This concern also extended to making use of the GISB's financial and personnel resources to support a major second initiative. As explained below, these concerns proved unfounded when the GISB Board forged ahead into the development and maintenance of retail business practices.

C. *The Increased Interdependencies Between Gas and Electric Industries*

At the same time, the board was faced with a strong initiative from the electric industry to make the GISB model available to deal with concerns in the electric wholesale arena. Specifically, many parties wanted the GISB standard-setting methodology to be made available beyond the gas industry, especially due to the increasing interdependency between natural gas supply and electric power generation.

Like the CUBR effort, there was some resistance at the board level, although the resistance was for a different reason. Most board members could agree that the issues at the wholesale level between the two industries were similar, or at least that the process used by the GISB usefully could be extended to the electric industry. So, philosophically, there was a closer match than was the case in the retail sector. Moreover, the wholesale electric industry likewise was dependent upon the activities and goodwill of the FERC which had already demonstrated an interest in and commitment to making the GISB standards mandatory for its jurisdictional entities.

The FERC's interest, in part, was due to its movement under Chairman Wood towards a standard market design for the electric industry. Like Chairman Allday who initiated deregulation of the natural gas industry, Chairman Wood recognized the importance of standardization of business practices and electronic data exchanges to the success of an integrated and deregulated electric industry.[21]

The two issues that surfaced and needed to be addressed were: (1) how would the GISB's extension to include the electric industry interface with the work of the North American Electric Reliability Council (NERC)[22] within the electric industry; and (2) would the admittance of the electric companies, many

21. *Electricity Market Design and Structure*, 97 F.E.R.C. ¶ 61,289 (2001) (stating that, "standards governing business practices and electronic communications are needed to complement the [FERC's] market design principles," and once the principles are developed, "wholesale business practice and communication standards must be developed as soon as possible thereafter so that the industry can operate efficiently under the market design principles").

22. The North American Electric Reliability Council was formed in 1968 to ensure that the bulk electric system in North America is reliable, adequate, and secure. North American Electric Reliability Council, http://www.nerc.com (last visited Feb. 12, 2006).

of which were affiliates of GISB members, diminish the role and effectiveness of the activities the GISB would continue to engage in for the wholesale gas industry? The concerns were real, but, again, the board was willing to consider the matter and make accommodations in the structure and procedures of the new expanded entity.

D. Formation and Structure of the NAESB

A GISB Board Task Force (Task Force) was established in December 1999 for two purposes: (1) to determine the level of interest in the GISB expanding its focus to address wholesale electric and retail standards by conducting open meetings with interested parties from among the energy industry and their trade associations; and (2) assuming such interest existed, to recommend how to accomplish this. The Task Force debated many issues, including whether to form a separate electric standards organization or expand the scope of the existing organization. Some GISB members expressed concern that gas interests not be diluted, or that the new standardization efforts not detract from those already underway. The Task Force also debated the role of independent system operators (ISOs), regional reliability organizations (RROs), and regional transmission organizations (RTOs).

On September 21, 2000, the Task Force presented its "strawman" proposal for the formation of a new organization. The proposal was for an "Energy Standards Organization" with a single Board of Directors and a single Executive Committee. Each body would consist of forty members divided into five industry segments which would be further subdivided into an equal number of natural gas and electricity seats. This strawman was subsequently revised on February 19, 2001.

In "strawman 2," the Task Force first proposed dividing the organization into four equal quadrants, each with an equal one-quarter voice in the combined board. It also proposed dividing the EC into four separate bodies capable of working jointly where a particular standardization effort impacted more than one industry. This revision necessitated the creation of a standing Triage Committee with representatives from each segment of each quadrant. The Triage Committee would be responsible for determining which EC, or combination of ECs, would develop a particular request for standards. This format provided the framework to encourage consensus across the various market interests combined into the new organization.

Several refinements were made and "strawman 2.1" was endorsed unanimously by the GISB Board on September 19, 2001. Among the changes was the selection of "North American Energy Standards Board" as the new organization's name. At a Board meeting, on December 5, 2001, the GISB Board adopted NAESB's bylaws and certificate of incorporation. These votes were ratified by the membership on December 21, 2001, and took effect January 1, 2002.

The founders of the NAESB maintained and codified the principles underlying the GISB's success in the NAESB's bylaws.[23] The NAESB also

23. The principles governing the NAESB are: independence, openness, voluntary, balance of interests, inclusivity, consensus-based decisions, no advocacy, membership driven, development of practices not policy, incorporation of best practices, broad applicability, and ANSI accreditation. N. AM. ENERGY STANDARDS BD., INC., BYLAWS OF NORTH AMERICAN STANDARDS BOARD, INC. (NAESB) § 2.2(b) (2002), *available at*

retained the methods adopted by the GISB to ensure openness, balance, and wide industry participation in its consensus standards development process. Meetings remained open and non-members were encouraged to participate at the subcommittee levels.[24] The industry-wide comment period prior to an EC vote was also maintained. Notices of meetings, their agendas and work papers were posted on the NAESB web site, www.naesb.org. As technology developed, web conferencing was used to augment teleconferences, reduce the cost of traveling to meetings, and increase participation.

1. Formation of Four Equal Quadrants

The new organization was determined to maintain balanced voting through continued use of separate industry segments. With the expansion of membership to include the wholesale electric industry and the retail industry, the solution was to divide the entire organization into four equal quadrants: the Wholesale Gas Quadrant (WGQ), Wholesale Electric Quadrant (WEQ), Retail Gas Quadrant (RGQ) and Retail Electric Quadrant (REQ).[25] Despite their quest for standardization and uniformity, the founders of the NAESB recognized that each of the four industries being asked to work together had differences that required some degree of variation. Accordingly, each quadrant was permitted to develop its own procedures as long as they conformed to the policies of the NAESB as stated in the Certificate and Bylaws.[26] The quadrant procedures would be exhibits to the Bylaws and supplements to the NAESB Operating Procedures.[27]

The existing GISB Board and EC members automatically became Board and EC members of the NAESB WGQ. The Edison Electric Institute (EEI),[28] through CUBR, and the Uniform Business Practices-Retail Standards Board[29] assisted with the formation of the REQ while the AGA assisted with the formation of the RGQ.

In its operating procedures, the WEQ went further than the other quadrants and created subsegments in each of its segments. The subsegments varied slightly from segment to segment to ensure that each member of the wholesale electric industry was allocated a seat on the EC and Board. Furthermore, formation of the WEQ took a slightly different path than the other quadrants due to the need to coordinate with the NERC's reliability standards development activities and to reach consensus on the role ISOs, RTOs, and RROs would play in the WEQ. The Commission spurred on consensus when it issued an order in December 2001 setting its parameters for an acceptable single industry-wide

http://www.naesb.org/pdf/naesbbylaws.pdf [hereinafter NAESB BYLAWS].

24. *Id.* at § 10.5(a).

25. N. AM. ENERGY STANDARDS BD., INC., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF NORTH AMERICAN STANDARDS BOARD, INC. Art. III § 2, *available at* http://www.naesb.org/pdf/naesbcert050503.pdf (last visited Feb. 12, 2006) [hereinafter NAESB CERTIFICATE OF INCORPORATION].

26. NAESB BYLAWS, *supra* note 23, at § 2.3.

27. The NAESB Operating Procedures were adopted by the Board on March 20, 2003.

28. The EEI represents shareholder-owned electric utility companies which provide 71% of all electricity to ultimate end-users in the United States and generate almost 60% of the electricity produced in the United States. EDISON ELEC. INST., ABOUT EEI, http://www.eei.org (last visited Mar. 16, 2006).

29. The ad hoc Uniform Business Practices-Retail Standards Board was formed on March 8, 2001 with thirty corporate members for the purpose of developing an organizational structure and operating design for a retail standards organization to serve the electric and gas retail choice markets.

standards organization for the wholesale electric industry.[30] The Commission required the standards drafting process be open to all, ensure due process, and include an appeals process. The Commission also sought the inclusion of a consensus process with a balance of interests that was able to coordinate development of business practice and reliability standards, and coordinate with other energy standards development efforts like those of the natural gas industry.[31] The Commission also set a March 15, 2002, deadline for agreement, and made it clear that failure to reach consensus would result in the Commission instituting its own procedures either to chose an organization or develop business practice standards itself.[32] This process benefited from the NERC Board's decision in February 2002 to concentrate on reliability and not develop business practice standards.

Several ideas permitting RTO/ISO/RRO coordination were debated. Although any RTO, ISO, or RRO member could join the NAESB individually, and several did, the NAESB's Board also sought a means of coordinating with the RTOs, ISOs, and RROs themselves. In the end, both coordination challenges were resolved by the negotiation and execution of a three-way memorandum of understanding between the NAESB, the NERC, and the ISO-RTO Council (IRC).[33] (The WEQ subsequently, in the Summer of 2005, amended its procedures to create an "At-Large" subsegment.)[34] In addition to providing a more representative place for ISOs and RTOs, this new subsegment also provided a place for consultants, service companies, information services and software companies, law firms, and other organizations that were not specifically encompassed in the other subsegments.

With the formation of four quadrants, there followed the formation of four separate ECs. The standards development and drafting responsibilities were kept in the ECs[35] and the balanced voting provisions were maintained ensuring that any standard voted out of any of the EC, was truly a consensus standard.[36] Like the GISB, the NAESB ECs also formed various specialized subcommittees and invited non-members and industry leaders to participate in their activities. This interaction and coordination of the separate quadrants and their subcommittees permitted, for the first time, the development of cross-industry consensus standards. Indeed, at the retail level, the REQ and RGQ ECs typically held joint meetings and worked under jointly developed annual plans. Their subcommittees were structured in a similar manner and also typically held joint meetings. The end result has been an entire set of commodity neutral retail model business practices.

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30. *Order Providing Guidance on the Formation of a Standards Development Organization for the Wholesale Electric Industry*, 97 F.E.R.C. ¶ 61,289 (2001), *on reh'g*, 99 F.E.R.C. ¶ 61,171 (2002).

31. 97 F.E.R.C. ¶ 61,289, at p. 62,301.

32. *Id.*

33. The ISOs and RTOs formed the ISO-RTO Council to better coordinate the many similar issues the two forms of entities must address. *See* discussion *infra* Section II.D.2.

34. The amended WEQ Procedures were adopted on April 14, 2005. For example, in the WEQ Transmission Segment there are five subsegments: municipalities and cooperatives; federal, states, and provincial government entities; investor owned utilities (IOUs); independent transmission companies (ITC); and At-Large. N. AM. ENERGY STANDARDS BD., INC., WHOLESALE ELECTRIC QUADRANT PROCEDURES § 2.5 (2005), *available at* http://www.naesb.org/pdf/weq_quadrant_procedures.pdf.

35. NAESB CERTIFICATE OF INCORPORATION, *supra* note 25, at Art. III § 5.

36. *Id.* at Art. V § 4.

The organization kept a unified Board of Directors. The Chairmanship of NAESB would rotate annually among the four Vice Chairs, each of whom represented one of the quadrants, ensuring that no single quadrant would dominate NAESB's leadership and that each quadrant would have equal tenure in the chairmanship. The Board was expanded to permit each segment of each quadrant to hold a seat; however, irrespective of the number of seats, no quadrant is permitted more than 25% of the voting strength.[37] Thus a quadrant with more segments would have more directors, but in no event could those directors collectively cast more than 25% of the vote of the Board. The quadrant seats were further allocated at five per segment. This 'weighting' mechanism established a sufficient comfort level for all parties and created, for the first time, an industry association that truly represented the entire energy industry. The NAESB Board kept the same responsibilities as the GISB Board, including the fiduciary responsibilities for the organization. The Board's operation as an "energy board" was reinforced by Delaware corporate law that states a board member owes an equal indivisible duty of loyalty to both the non-profit organization and his or her employer.[38]

The growth of the Board to include members from the three new quadrants and each of their segments ensured that Board decisions would be fair and balanced. However, it also meant that decisions would take longer, voting would be more cumbersome and special meetings would be more difficult to arrange. In response, on August 30, 2002, the Board formed a Managing Committee (MC) to assist the Chair, enhance credibility of senior leadership, and help facilitate future chair succession.[39] The composition of the MC included the Chair, each quadrant Vice Chair, and past Chairs if they were still members of the Board. The final MC member was the Executive Director[40] who participated in a non-voting capacity. The MC was delegated responsibility for assisting the Chair and Executive Director in preparing and monitoring financial matters, budgets, audit reports, and quadrant annual plans prior to submission to the full Board. It was asked to act as a compensation and benefits committee for NAESB staff, and to act as an editorial review committee to approve formal external communications, press releases, and communications with regulatory agencies. The MC was delegated authority over any other matter requiring a simple majority vote of the Board, except matters specifically reserved to the full Board, as long as the full Board had an opportunity to review the MC actions at its next regular meeting.

37. NAESB BYLAWS, *supra* note 23, at § 7.3. Although some quadrants have more Board seats than others, no quadrant is entitled to case a vote greater than its one quarter representation on the Board.

38. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (explaining, that "[t]his is merely stating in another way the long-existing principle of Delaware law that these [Company A] designated directors on [Company B's] board still owed [Company B] and its shareholders an uncompromising duty of loyalty," and that "[t]here is no 'safe harbor' for such divided loyalties in Delaware"); Sealy Mattress Co. v. Sealy, Inc., 532 A.2d 1324, 1337–38 (Del. Ch. 1987) (holding that employees of one corporation who sit on the board of another become fiduciaries "with a concomitant affirmative duty to protect the interests of the minority, as well as the majority, stockholders" by virtue of assuming the position of directors).

39. NAESB BYLAWS, *supra* note 23, at §§ 7.8(a), 8.7. The Board subsequently clarified the MC's role and authority in a resolution adopted September 23, 2002.

40. On March 3, 2005, the Board gave the Executive Director and Chief Operating Officer the additional title of President.

2. Memorandum of Understanding with the NERC and the IRC

Beginning with the formation of NAESB in 2002, the NERC and the NAESB initiated discussions regarding coordination between the two standards setting organizations. They both realized that the standards each developed would have an effect on the work of the other. NERC standards and policies would affect business practices and NAESB standards would affect reliability of service. By the Summer of 2002, discussions had developed into a formal Memorandum of Understanding (MOU) between the two organizations to ensure that the business practice and reliability standards were harmonized, overlapping and duplicative efforts were eliminated, and each organization was able to move forward with its own standards development activities while keeping the other fully informed. Provisions were also made for joint standards development and dispute resolution. The NERC-NAESB MOU was approved by the NAESB Board on November 18, 2002.

The NAESB Board was also discussing the formation of a Technical Advisory Council (TAC) to allow ISOs, RROs, RTOs, and similar organizations a voice in the NAESB. While any of these organizations were able to send representatives to participate in NAESB's open activities and several joined and became voting members, the TAC was intended to provide an enhanced and more formal role for these entities in recognition of the unique role they hold in the wholesale electric industry.

However, it quickly became apparent that the ISOs and RTOs were also interested in a more formal MOU relationship with the NAESB instead of the TAC proposal. Negotiations on a three-party MOU were immediately undertaken. Representatives of the NERC, the IRC, and the NAESB met over a six month period to craft a *modus vivendi*. In the end, the group established a set of guidelines that permitted the rational allocation between matters that primarily were commercial business practices (to be assigned to the NAESB) and reliability practices (to be assigned to the NERC). The IRC does not receive assignments since it is not a standards development organization.

It was clear that while most matters would fall into one category or the other there would obviously be some overlap, and it also was apparent that there would be some requests that would fall into a gray area. In each case it was expected that the working group appointed under the MOU would make the initial assignment via majority-plus vote, and the rules of the organization to which a matter was assigned would apply to the initial work done. It was also decided that each party would be permitted to participate in the other's development process consistent with the rules in place, and that the parties would keep one another informed of progress. Finally, if issues were identified during work on a matter or a request that fell into the other organization's bailiwick, that would be dealt with to assure the legitimacy of the result. A final NERC-NAESB-IRC agreement was approved by the NAESB Board on March 20, 2003, the NERC Board of Trustees on March 25, 2003, and the IRC on April 24, 2003.[41]

41. N. AM. ENERGY STANDARDS BD. ET AL., AMENDED AND RESTATED MEMORANDUM OF UNDERSTANDING FOR THE NORTH AMERICAN ENERGY STANDARDS BOARD, NORTH AMERICAN ELECTRIC RELIABILITY COUNCIL AND THE ISO/RTO COUNCIL (2003), *available at* http://www.naesb.org/pdf/memorandum_of_understanding.pdf.

III. LEGAL UNDERPINNINGS OF NAESB'S PUBLIC-PRIVATE PARTNERSHIP

In a 1996 interview in *GISB Review*, the organization's quarterly newsletter, FERC Chairman James Hoecker described the relationship between FERC and GISB this way:

> "The characterization I would give is a public-private partnership. Setting the terms and conditions of service is a matter of jurisdictional interest for this agency under the Natural Gas Act, and we have, in the process of helping to restructure the services of interstate pipelines, taken a great deal of interest in how interstate pipelines provide open and nondiscriminatory access to their facilities and their services."[42]

> "I think it's the involvement of all elements of the industry in helping us collect data and resolve some very arcane and technical operational issues that gives GISB its enormous value. It would require an enormous resources commitment on our part to address those issues and, frankly, it would be very difficult with even the best technical staff here at the agency to comprehend all the business implications of these decisions."[43]

The partnership envisioned by Chairman Hoecker has, if anything only strengthened as the FERC has incorporated the vast majority of GISB and NAESB's standards into the commission's regulations and the NAESB has expanded its scope to the retail energy and wholesale electric industry. During the past ten years, the GISB and now the NAESB have also developed public-private partnerships, both formally and informally, with the United States Department of Energy, American state public utility commissions, the Canadian National Energy Board, Canadian provincial utility boards and commissions, and Mexico's Comision Reguladora de Energia. This article, however, is limited to the legal underpinnings of these public-private partnerships under United States laws and regulations.

A. *Law of Delegation of Authority to Non-Government Organizations*

Over the past two centuries there has been a migration of legislative functions from the Congress to Cabinet level agencies, to independent agencies, and to some limited number of non-governmental organizations. The process is not complete, but it is evidence of a need, in an increasing complex society, to create a variety of commercial norms. A thoughtful article published in this Journal in 1994 addressed the constitutional and statutory considerations relating to the FERC's authority to delegate certain authority to a voluntary, industry sponsored and supported private body such as the GISB, the NAESB's predecessor.[44]

Although the FERC has not availed itself of its option to delegate standards setting authority to the GISB or the NAESB, the legal principles of executive agency delegation are worth examining since the Commission, under the direction of future Chairmen, always has the freedom to exercise this option.

The 1994 article examined *Sunshine Anthracite Coal Co. v. Adkins*[45] and

42. James Hoecker, *GISB Has Proved it's Equal to Challenges Set by FERC*, GISB REVIEW (Gas Industry Standards Board, Houston, Tex.), Spring 1996, at 6. (on file with authors).

43. *Id.*

44. Michael T. Mishkin & David I. Adelman, *Gas Industry Standards Board: Legal Considerations in the Standard Setting Process*, 15 ENERGY L.J. 73 (1994).

45. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

related cases upholding Congress' constitutional authority to expressly delegate to an industry organization as long as the federal government retained some degree of authority and surveillance over the activities delegated and the delegation was consistent with the legislative intent of the relevant statute. This analysis included consideration of *Noblecraft Industries v. Secretary of Labor*,[46] which held that an agency may chose from among a number of privately established standards when implementing Congress' mandate to set forth a "national consensus standard."

The 1994 article also reviewed *Tabor v. Joint Board for Enrollment of Actuaries*[47] for guidance on instances where Congress is silent regarding its intent that responsibilities be re-delegated by a government agency to an industry-sponsored organization. Applying these cases to the context of the FERC' plenary authority under the Natural Gas Act[48] to regulate pipelines and the Commission's decision to adopt the GISB's EDI standards in Order 563,[49] the authors concluded that such a delegation would be proper, as long as Congress had not expressly prohibited the delegation and such delegation was not inconsistent with the applicable statute.

In the intervening decade since this article was published, the law in this area has not changed much. The courts have, however, refined their delegation theory analysis into three general areas of permissible delegation to non-subordinate non-government entities. These permissible areas were best summarized in *United States Telecom Association v. FCC*.[50] In *U.S. Telecom*, the District of Columbia Circuit reviewed the delegation of authority by the Federal Communications Commission (FCC) to state regulatory commissions the determination of which network elements should be available on an unbundled basis. Although the court ultimately held that sub-delegation by a federal agency to a state decision-making authority was not appropriate under the case at bar, the court also laid out the three instances where outside parties may have a legitimate role to play in the agency decision-making process: "(1) establishing a reasonable condition for granting federal approval; (2) fact gathering; and (3) advice giving."[51]

The instance most applicable to the FERC's relationship with the NAESB is the later, advice giving. We turn now to a review of this line of cases.

In *United States v. Frame*,[52] the Third Circuit upheld the delegation of

46. Noblecraft Indus., Inc. v. Sec'y of Labor, 614 F.2d 199, 202–03 (9th Cir. 1980). *See also* United States v. Frame, 885 F.2d 1119, 1128–29 (3d Cir. 1989) (upholding regulatory enforcement scheme that called for a private industry organization to assume ministerial and advisory duties).

47. Sol Tabor v. Joint Bd. for the Enrollment of Actuaries, 566 F.2d 705, 708 (D.C. Cir. 1977). *See also* Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947) (upholding delegation of subpoena power when the Emergency Price Control Act contains no express provision authorizing delegation); Ashwood Manor Civic Ass'n v. Dole, 619 F. Supp. 52, 66 (E.D. Pa. 1985) (holding that legislative intent must be reviewed when agency head delegates to subordinates, and that express authority to delegate is not required for delegation within an agency); EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907, 921–23 (D.C. Md. 1974) (holding "the omission of any specific grant of the power to delegate should not be construed as a denial of that power").

48. 15 U.S.C. § 717g(a) (2000).

49. Order No. 563, *supra* note 4.

50. U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

51. *U.S. Telecom*, 359 F.3d at 566; S. Pac. Transp. Co. v. Watt, 700 F.2d 550, 556 (9th Cir. 1983) (upholding the sub-delegation of authority by the Department of Interior to the local Walker River Paiute Tribe).

52. United States v. Frame, 885 F.2d 1119, 1128–29 (3d Cir. 1989); *see also* R.H. Johnson & Co. v.

assessing and collecting fees to members of the beef industry acting through the congressionally created Cattlemen's Board and Operating Committee. The court found the amount of government oversight to be considerable and that no lawmaking authority was entrusted to the members of the beef industry.[53] "In essence, the Cattlemen's Board and the Operating Committee serve an advisory function, and in the case of collection of assessments, a ministerial one," the court concluded.[54]

Likewise, the Ninth Circuit held that the Secretary of Agriculture was free to seek advice from whatever private industry sources he deems appropriate, so long as the Department retained ultimate authority to issue regulations.[55] A district court reached a similar result when the U.S. Department of Defense delegated the drafting of revised mental health care standards and the certification and inspection of residential treatment centers to a contractor, but retained all final decision-making authority.[56]

The Third Circuit Court of Appeals has upheld an Occupational Safety and Health Administration (OSHA) regulation that incorporated the standard for threshold limit values for chemical substances and physical agents in the work environment, as was established by an impartial scientific organization.[57] The panel found adoption of the standards to be appropriate and consistent with the applicable sections of the authorizing legislation requiring adoption of standards "based on 'the best available evidence' [and] with due consideration to 'the latest available scientific data.'"[58]

In *Ocean Conservancy*, the Court noted that the group of independent scientist advising the National Marine Fisheries Service (NMFS) was only providing advice to the federal agency.[59] In upholding the subdelegation to NMFS and the re-delegation to the scientific panel, the Court noted that the agency set the procedures and analytic processes for the scientists to follow, and retained final reviewing authority over their findings.[60]

Conversely, in *National Park Conservation Association v. Stanton*,[61] the court found a complete abdication of the Secretary of Interior's responsibilities

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SEC, 198 F.2d 690, 695 (2d Cir. 1952) (upholding enforcement of securities law by the private National Association of Securities Dealers, Inc. where the Securities and Exchange Commission retained independent review of decisions and conducted its own investigation of violations).

53. *Frame*, 885 F.2d at 1128. Ironically, the Third Circuit subsequently found this high degree of government oversight as evidence of the unconstitutional compelling of speech by a government agency in violation of the First Amendment. Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004) (declaring the Dairy Promotion Stabilization Act unconstitutional).

54. *Frame*, 885 F.2d at 1129.

55. Riverbend Farms v. Madigan, 958 F.2d 1479, 1488 (9th Cir. 1992) (upholding the establishment of a Navel Orange Administrative Committee to recommend weekly volume of oranges authorized for shipment into various markets where the Secretary adopted those recommendations without any changes or amendments over 90% of the time).

56. Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Mendez, 857 F. Supp. 85, 91 (D.C. Cir. 1994).

57. Associated Builders & Contractors v. Brock, 862 F.2d 63, 68–69 (3d Cir. 1988). This case represented the consolidation of cases transferred from the D.C. Circuit, Second Circuit, and Fourth Circuit challenging the same regulations.

58. *Associated Builders*, 862 F.2d at 69.

59. Ocean Conservancy v. Evans, 260 F. Supp. 2d 1162, 1183–84 (M.D. Fla. 2003).

60. *Id.* at 1183.

61. Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7 (D.C. Cir. 1999).

when he turned over management of the Niobrara National Scenic River to an independent council of local leaders and business people.[62] According to the court, the action violated the doctrine of unlawful delegation because the agency retained virtually no final reviewing authority over the actions, or inactions, of the private council.[63] That the Secretary's representative held a single seat on the fifteen member council and had the ability to void the agreement creating the council did not persuade the court that enough oversight was maintained.[64]

The *National Park* court noted the imbalance of the scenic river council's composition, heavily weighed with private interests likely to conflict with the environmental interests the Secretary was statutorily mandated to represent, as potentially creating a conflict of interests.[65] The U.S. Court of International Trade has held, when reviewing the delegation of foreign currency rate determinations to the New York Federal Reserve (NY Fed), that "[d]elegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on grounds of conflict of interest."[66] After noting that the NY Fed is a private corporation owned by member banks within its district and that the International Trade Administration (ITA) did not retain any discretion to review or administrative scrutiny of NY Fed determinations, the *Pistachio* court held that an invalid delegation of the ITA's authority had occurred.[67]

Article I of the U.S. Constitution expressly reserves legislative functions to Congress.[68] As the above cases demonstrate, Congress' ability to delegate to the executive branch, who in turn may opt to subdelegate to private entities, is limited and deserving of close scrutiny. This line of cases is instructive since each court addressed the "difficult separation of powers and related questions or objections to the degree of power transferred" rather than taking the easier route of simply declaring that no delegation had actually occurred.[69] In doing so, the Courts were cognizant of the potential conflicts of interests that can arise from

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61. Id. at 19–20.

63. *Nat'l Park*, 54 F. Supp. 2d at 20.

64. *Id.* at 19–20.

65. *Nat'l Park*, 54 F. Supp. 2d at 20.

66. Pistachio Group of the Ass'n of Food Indus. v. United States, 671 F. Supp. 31, 35 (Ct. Int'l Trade 1987).

67. *Id.* at 35–36.

68. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1;

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. I, § 8, cl. 1, 3, 18.

69. *See Pistachio Group*, 671 F. Supp. at 39 (stating "[b]y ruling that 'no delegation has occurred' rather than finding that a given delegation is proper, courts may avoid answering difficult separation of powers and related questions or objections to the degree of power transferred"); *cf.* Perot v. FEC, 97 F.3d 553, 559–60 (D.C. Cir. 1996) (ruling that no delegation occurred by the Federal Election Commission to private Commission on Presidential Debates by virtue of the agency's broad regulations being susceptible to differing interpretations).

subdelegation to the persons being regulated.

Nowhere in its regulations or orders has the FERC delegated any rulemaking authority to the NAESB creating any standing jurisdiction over a particular area of natural gas or electric regulation. The NAESB develops voluntary business practice standards only upon the submission of a Request for Standards which may be submitted by either a member or non-member. From time-to-time, however, the Commission will request the NAESB to develop business practice standards in a particular area through a formal order,[70] or through an informal letter from the Chairman.[71] There is no open mandate that the NAESB submit its final ratified standards to the Commission, other than the occasional polite requests from each successive Chairman for the information.[72]

Even if a court did find some degree of delegation through a requirement that the NAESB advise the Commission on business practice standards or electronic commerce,[73] such a subdelegation would withstand challenge.

The Congress has not expressly prohibited the FERC from subdelegating its development of business practice or electronic commerce standards. Indeed, as explained more fully below, Congress has expressly required all federal agencies to use technical standards developed by voluntary consensus standards organizations as a means to carry out policy objectives or activities.[74]

The adoption of industry consensus business practice and electronic commerce standards is consistent with the legislative intent of the Natural Gas Act (NGA).[75] As noted by Mishkin and Adelman,[76] the NGA gives the FERC plenary authority over natural gas companies and empowers the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the NGA]."[77]

Similarly, the adoption of industry consensus business practice and electronic commerce standards is consistent with the legislative intent of the

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70. *See, e.g.*, Order No. 587-E, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,053, 62 Fed. Reg. 25,842 (1997) (to be codified at 18 C.F.R. pt. 284).

> Given the importance of developing standardized communications, the Commission expects GISB and the industry to move forward rapidly to complete the standardization process so that the Commission can substitute standardized communication modalities for the requirement for pipelines to maintain EBBs. The Commission requests a report by GISB, and others who may wish to comment, by September 1, 1997 on the extent of their progress and the contemplated completion date.

Id. at p. 30,603.

71. *See, e.g.*, Letter from Pat Wood III, FERC Chairman, to Rae McQuade, NAESB Executive Director (Nov. 14, 2003), *available at* http://www.naesb.org/doc_view2.asp?doc=ferc111403.pdf (encouraging the development of complimentary business practice standards to the NERC reliability standards as "a high priority which is deserving of a commitment of resources to accomplish, preferably prior to the summer season").

72. The FERC could arguably make its request a mandate, but the NAESB Managing Committee has never forced the Commission, or its Chairman, to issue a subpoena or demand copies of the final standards. *See, e.g.*, 16 U.S.C. § 797(c) (2000) (granting the FERC authority to request information); 18 C.F.R. pt. 1b (granting the FERC authority to issue subpoenas and make data requests).

73. *See* EEOC v. Raymond Meta Prods., 385 F. Supp. 907, 919 (D. Md. 1974) (observing that "[d]elegation is a matter of degree").

74. 15 U.S.C. § 272 (1994).

75. 15 U.S.C. §§ 717–717z (1940).

76. Mishkin & Adelman, *supra* note 44, at 78–79.

77. 15 U.S.C. § 717o (2000).

Federal Power Act (FPA).[78] The FPA, as amended, gives the FERC plenary authority over the transmission and sale of electric energy, and authorizes the Commission to "propose rules, regulations, and statements of policy . . . ."[79]

The FERC has retained all the review and oversight authority necessary to permit a subdelegation to the NAESB to pass constitutional muster if it chose to do so. Indeed, whether the Commission chooses to take any action on a particular NAESB submission has always been at the sole discretion of the Commission since it retains final decision making authority—including the decisions to do nothing, amend, or supplement NAESB's final standards.

As an example of the Commission's oversight authority, in 2002, the Commission requested that the NAESB develop and provide the Commission with generic consensus standards for creditworthiness of shippers on natural gas pipelines, "or if consensus cannot be reached, an account of its deliberations, including an outline of the standards considered, the voting records, and the reasons for the inability to reach consensus . . . ."[80] Nine months later, the NAESB submitted ten creditworthiness standards and the requested deliberations setting forth the reasons that an additional fourteen draft standards were not adopted by the WGQ EC.[81] The Commission conducted its own independent review and adopted the ten ratified WGQ creditworthiness standards.[82] The Commission also recognized that the NAESB was "unable to reach consensus on policy issues that have disparate effects on each of the industry segments" and set forth its own additional requirements in its regulations.[83] In a few instances, the Commission also supplemented the consensus NAESB standards where it felt the NAESB's standards were not sufficient.[84]

Another example, comes from a Notice of Proposed Rulemaking (NOPR) proposing to incorporate by reference WGQ Version 1.7 standards, where the Commission suggested that posting disclosure information in a separate location, as set forth in Order 2004-A,[85] was the preferred approach to one taken by the NAESB.[86] The WGQ EC quickly drafted, and passed, a modification to the relevant standard. It was submitted to the FERC four months later.[87] When the Commission subsequently issued its final rule adopting WGQ Version 1.7 in

78. 16 U.S.C. §§ 791–823d (1922).

79. 42 U.S.C. § 7173(a) (2000). "[T]he Commission [is] authorized to propose rules, regulations, and statements of policy of general applicability with respect to any function within the jurisdiction of the Commission . . . ." *Id.*

80. *Tennessee Gas Pipeline Co.*, 100 F.E.R.C. ¶ 61,268 at P 16 (2002).

81. NAESB Progress Report on Pipeline Capacity Creditworthiness Standards Development, FERC Docket No. RM96-1-000 (June 16, 2003).

82. Notice of Proposed Rulemaking, *Creditworthiness Standards for Interstate Natural Gas Pipelines*, F.E.R.C STATS. & REGS. ¶ 61,123, 69 Fed. Reg. 8587 (2004). This NOPR was ultimately adopted as a final order as part of Docket No. RM96-1-026 in Order 587-S. *Standards for Business Practices of Interstate Natural Gas Pipelines*, 111 F.E.R.C. ¶ 61,203 (2005) (adopting WGQ Version 1.7).

83. Notice of Proposed Rulemaking, *Creditworthiness Standards for Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 61,123 at P 4, 69 Fed. Reg. 8587 (2004).

84. *Id.* at P 26 (supplementing WGQ standard 5.3zD).

85. Order No. 2004-A, *Standards of Conduct for Transmission Providers*, F.E.R.C. STATS. & REGS. ¶ 31,161, 69 Fed. Reg. 23,562 (2004) [hereinafter Order No. 2004-A].

86. Notice of Proposed Rulemaking, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 61,326 at PP 8–9, 70 Fed. Reg. 319 (2004).

87. Report of the North American Energy Standards Board, FERC Docket Nos. RM96-1-026, RM98-10 (Apr. 22, 2005), *available at* http://www.naesb.org/doc_view2.asp?doc=ferc042205.pdf.

Order 587-S, the business practices contained the modification requested in the NOPR.[88]

Finally, the NAESB's ANSI approved consensus process for drafting and ratifying business practice standards ensures that the end result is truly an industry-wide pronouncement. The members, and non-member participants, include representatives of industry trade associations, consumer advocate organizations, natural gas and electricity end-users or consumers, and the state and federal regulatory communities. Not only must each segment of the industry agree to the passage of a NAESB standard, but any single segment may veto passage of a standard. This process protects against even the appearance of a conflict of interest as all meetings are open to the public and recorded in publicly available minutes. All votes of the subcommittees, EC and ratifying membership are recorded and publicly available.

In conclusion, the Commission could subdelegate authority to NAESB and such a subdelegation would survive challenge. However, that is not how the FERC, or any state regulatory body, has opted to proceed.

B. Law of Incorporation of Industry Standards by Reference

Regulators have long relied upon authoritative industry standards to discharge their regulatory responsibilities. While the subdelegation of those responsibilities, as shown above, is one means of effecting this public-private partnership, it has not been the method actually utilized by the FERC, or any other regulator, when availing themselves of the NAESB's standards.[89] Instead, the method used almost exclusively has been the incorporation of NAESB standards by reference.[90] At the federal level, incorporation by reference of industry standards is not only preferred but mandated by the National Technology Transfer and Advancement Act (NTTAA) and the executive pronouncements in the Office of Management and Budget Circular A-119. The FERC has followed these mandates with three different procedural mechanisms, depending on the goals it seeks to achieve or the issue it is addressing. The FERC has incorporated NAESB standards by reference: (1) in adjudicatory case-by-case determinations; (2) in generic policy statements; and (3) in formal rulemaking proceedings resulting in codified regulations.

Each mechanism has benefits and limitations. The NAESB has never

88. Order No. 587-S, *Standards for Business Practices of Interstate Gas Pipelines*, [Regs. Preambles] F.E.R.C. STATS. & REGS. ¶ 31,179 (2005), 70 Fed. Reg. 28,204 (2005) (to be codified at 18 C.F.R. pts. 161, 250, 284) [hereinafter Order No. 587-S].

89. *Cf.* Sweden G. Kelly, Maria F. Vouras & Jennifer S. Amerkhail, *The Subdelegation Doctrine and the Application of Reference Prices in Mitigating Market Power*, 26 ENERGY L.J. 297 (2005) (exploring the legal underpinnings of the Commission's subdelegation of ensuring just and reasonable electric rates and market monitoring responsibilities to non-federal non-governmental ISOs and RTOs).

90. *See* Notice of Proposed Rulemaking, *Standards for Business Practices and Communications Protocols for Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 32,582 at P 15, 70 Fed. Reg. 28,222 (2005) "As the Commission has pointed out on several occasions, incorporation by reference is the appropriate, and indeed the required, method for adopting copyrighted standards material." *Id.* Other procedural mechanisms relied upon by the Commission include a "notice of inquiry" and "request for public comment" which are preliminary steps to using rulemaking or a policy statement to adopt an industry standard. These mechanisms are not used to bring a proceeding to a conclusion, but rather to frame and narrow the issues that become the subject of a rulemaking or policy statement. *See, e.g.*, Notice of Inquiry, *Information Requirements for Available Transfer Capability*, F.E.R.C. STATS. & REGS. ¶ 35,549, 70 Fed. Reg. 34,417 (2005).

expressed a preference for a particular mechanism since the consensus-building standards drafting process at the NAESB would be the same under each. The Commission, with each mechanism, pronounces the policy and provides the NAESB guidance, and the NAESB develops standards to implement the Commission's policy. Where gaps or uncertainty of the applicable policy exist,, the NAESB will often reach an impasse requiring further guidance from the Commission.

1. OMB Circular A-119

The Federal Office of Management and Budget (OMB) is part of the Executive Office of the President and has responsibility for developing government-wide financial management policies, procurement policies, and information policies, implementing electronic government policies, and supporting the President in the submission of an annual budget to Congress.[91] From time-to-time, the OMB issues policies to improve the internal management of the Executive Branch.[92] In 1980, the OMB first issued Circular A-119 governing federal agency participation in the development and use of voluntary consensus standards and conformity assessment activities.[93] The most current revision of OMB Circular A-119 was issued on February 10, 1998.[94]

OMB Circular A-119 directed "agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical."[95] It contained a rebuttable presumption that required an agency to submit a report describing its reasons for use of government-unique standards in lieu of private voluntary consensus standards. It did not contain such a reporting requirement where non-consensus private standards were utilized.[96] The purpose of Circular A-119 was to "[e]ncourage federal agencies to benefit from the expertise of the private sector" and "to reduce to a minimum the reliance by agencies on government-unique standards" thereby eliminating the cost to the government of developing its own standards, and promoting efficiency and economic competition through harmonization of standards.[97]

A voluntary consensus standards body was defined in OMB Circular A-119 as possessing the attributes of openness, balance of interests, due process, an appeals process, and consensus.[98] The Circular did not incorporate ANSI's

91. 31 U.S.C. §§ 501–507, 521–522, 1101–1119 (2000); 41 U.S.C. §§ 403–437 (2000); 44 U.S.C. §§ 3501–3521, 3601–3606 (2000).

92. 31 U.S.C. § 1111 (2000).

93. Office of Mgmt. & Budget, Federal Participation in the Development and Use of Voluntary Standards, Final Issuance of OMB Circular No. A-119, 45 Fed. Reg. 4326 (1980).

94. Office of Mgmt. & Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Final Revision of Circular A-119, 63 Fed. Reg. 8546 (1998). Previous versions were published at 58 Fed. Reg. 57,643 (1993), and 47 Fed. Reg. 49,496 (1982).

95. *Id.* at 8553.

96. 63 Fed. Reg. 8546.

97. *Id.* at 8546, 8554.

98. 63 Fed. Reg. 8546, at 8554. OMB Circular A-119 defined "consensus" as "general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments." *Id.*

standards for certification of standards developing organization, but left such determinations to individual agencies.[99] The Circular defined "standards" to include, inter alia, business practice standards.[100] When referencing a voluntary consensus standard in its regulations, agencies were directed to include a statement identifying the standard, sources of availability, and date of issuance, and to observe and protect the rights of any copyright holders.[101]

The Circular also provided guidance for federal agencies participating in voluntary consensus standards bodies where doing so was in the public interest and was consistent with the agency's mission, authority, and budget resources. Agency support could not be contingent upon the outcome of the standards development activity, and the total amount of federal support should generally not have been greater than that of other participants.[102] Agency employees were cautioned to avoid even the appearance of undue influence, and were prohibited from directing the internal operations of the standards developing organization.[103] In sum, agency employees were encouraged to enjoy full and equal participation including involvement in discussions, registering of opinions and voting.

2. The National Technology Transfer and Advancement Act

The 104th Congress codified OMB Circular A-119 in the NTTAA § 12(d)[104] by requiring federal agencies to adopt and use standards developed by voluntary consensus standards bodies and to work closely with those organizations to ensure that the developed standards are consistent with the agency's policy objectives. The statute provides that, "all Federal agencies and departments ***shall*** use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments."[105]

The statute requires agencies and departments to "consult with voluntary, private sector, consensus standards bodies," and encourages them to "participate with such bodies in the development of technical standards."[106] The mandatory use of consensus standards may only be ignored where such standards are "inconsistent with applicable law or otherwise impractical . . . ."[107] In such cases, the agency or department must affirmatively inform the OMB of its reason

99. Office of Mgmt. & Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Final Revision of Circular A-119, 63 Fed. Reg. 8546, 8548 (1998).

100. *Id.* at 8554 (using the phrase "management systems practices").

101. 63 Fed. Reg. 8546, at 8555.

102. *Id.* at 8556.

103. 63 Fed. Reg. 8546, at 8549, 8556. Where an agency employee participates as an officer, director, or trustee of the private standards developing organization, the agency's ethics officer must be consulted. *Id.* at 8556.

104. 15 U.S.C. § 272 (1994). *See* H.R. Rep. No. 104-390, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 493, 501. Section 12(d) began as an amendment to H.R. 2196 by Congresswoman Connie Morella (R-MD).

105. 15 U.S.C. § 272 (2000) (emphasis added) (citing historical and statutory notes). The NTTAA defines "technical standards" as "performance-based or design-specific technical specifications and related management systems practices." *Id.*

106. 15 U.S.C. § 272 (citing historical and statutory notes).

107. *Id.*

for using some other standard, and the OMB must forward the reason to Congress annually.[108]

In the House Report accompanying the legislation, the House Science Committee recognized that the United States "reli[ed] heavily on a decentralized, private sector-based, voluntary consensus standards system," while much of the rest of the world utilized rigid federalized standards systems.[109] The American system was lauded as contributing to greater competitiveness, health, public welfare and safety. However, the Committee also recognized the challenge to keep decentralized standards activities updated, reduce duplication of efforts, and avoid conflicts between government standards and widely-accepted industry practices. The intent of the Committee, the House Report continued, was "to make private sector-developed consensus standards the rule, rather than the exception."[110]

C. *FERC's Incorporation of NAESB Standards by Reference*

Having concluded that the FERC does not subdelegate authority to NAESB, and that the Commission is under the mandates of OMB Circular A-119 and NTTAA § 12(d) to fulfill its obligations for standardization through incorporation by reference, we turn now to several mechanisms available to the Commission to implement the incorporation of NAESB standards by reference.

1. Adoption through Adjudications, Administrative Procedures Act Section 554

When the Commission proposes to include a NAESB standard as a term or condition in an interstate pipeline or public utility tariff, it will review that standard under the "just and reasonable" standard in section 5 of the NGA[111] and section 206 of the FPA.[112] Adjudicatory proceedings are governed by section 554 of the Administrative Procedures Act (APA).[113]

The Supreme Court, in *NLRB v. Wyman-Gordon Co.*, has explained that case-by-case adjudications:

> [m]ay and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified

108. 15 U.S.C. § 272 (citing historical and statutory notes).

109. H.R. Rep. No. 104-390, at 10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 493, 510.

110. H.R. Rep. No. 104-390, at 24 (1996), *reprinted in* 1996 U.S.C.C.A.N. 493, 511.

111. 15 U.S.C. § 717d (2000). Under section 4(c) of the Natural Gas Act, natural gas companies must file with the FERC all "rates and charges . . . and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 15 U.S.C. § 717c(c). Under sections 4(a) and 4(b) of the Natural Gas Act, such rates, charges, rules and regulations must be just and reasonable, and not "grant any undue preference or advantage . . . or . . . maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect . . . ." 15 U.S.C. §§ 717c(a), 717c(b).

112. 16 U.S.C. § 824e (2000). Under section 205(c) of the Federal Power Act, public utilities must file with the Commission all "rates and charges . . . and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. § 824d(c). Under sections 205(a) and 205(b) of Federal Power Act, these rates, charges, classifications, and regulations must be just, reasonable, and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d(a), 824d(b).

113. 5 U.S.C. § 554 (2000).

role of stare decisis in the administrative process, they may serve as precedents.[114]

The limitation on this approach is that the decision on such a filing technically applies only to that pipeline or utility and may not be controlling with respect to another entity's filing. Such decisions must be obeyed only if they form the basis of an order issued to an entity in its own case. The Supreme Court went on to criticize attempts to formulate rules through adjudications: "The rule-making provisions of that Act [APA] . . . were designed to assure fairness and mature consideration of rules of general application. They may not be avoided by the process of making rules in the course of adjudicatory proceedings."[115]

Attempting to prescribe rules in adjudications deprives "all interested parties" of the "opportunity to participate in the rule making."[116] The regulated entity, however, can challenge the application of such a standard, or set of standards, to it in such a proceeding. When the FERC seeks to apply the standard again, it has to go through the same proceeding with the individual utility involved. If the FERC seeks to adopt an industry-wide standard in that fashion, the agency would expend great effort. Therefore, adjudications have limited effectiveness in ensuring uniform implementation of a standard. To overcome this handicap, the Commission could consolidate all tariff filings containing a particular standard, or set of standards, for a single hearing and decision. The Commission has used this approach not only to establish area rates for producers,[117] but also to review pipeline tariff filings.[118]

The Commission has on occasion used adjudicatory proceedings to adopt generic industry-wide standards.[119] In *Tennessee Gas Pipeline Co.*, the FERC sought to adopt creditworthiness standards for the pipeline industry after several parties complained that the pipeline's credit requirements were overly burdensome and disparate from requirements on other pipelines with which they scheduled transportation.[120] The Commission saw the value in a "generic standard for creditworthiness since shippers would be able to provide the same documents to every pipeline to obtain capacity, and there appears to be value in establishing standards for when a pipeline must provide service to a shipper."[121] The Commission encouraged the parties to initiate a consensus standards development process at the NAESB and set a nine-month deadline for submission of a report stating either that standards have been adopted or the reasons for the inability to reach consensus along with the NAESB's deliberations.

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114. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969) (citations and footnotes omitted) (enforcing the NLRB's decision in the adjudicatory proceeding, but denying the agency the ability to refer to and utilize prior adjudicatory decisions as a general rule applicable to all).

115. *Id.* at 764 (citations and footnotes omitted).

116. *Wyman-Gordon*, 394 U.S. at 764–65. In some circumstances, the FERC has allowed intervention by unrelated parties in individual cases where general precedent may be developed. *See, e.g.*, *Florida Municipal Power Agency*, 65 F.E.R.C. ¶ 61,125, at p. 61,612 (1993).

117. *See, e.g.*, *In re* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

118. *ANR Pipeline Co.*, 61 F.E.R.C. ¶ 62,237, at p. 63,446 (1992).

119. *Tennessee Gas Pipeline Co.*, 101 F.E.R.C. ¶ 61,311 at P 4 (2002).

120. *Tennessee Gas Pipeline Co.*, 100 F.E.R.C. ¶ 61,268 (2002), *on reh'g*, 101 F.E.R.C. ¶ 61,311 (2002), *reh'g denied*, 103 F.E.R.C. ¶ 61,275 (2003), *on reh'g*, 105 F.E.R.C. ¶ 61,120 (2003), *aff'd*, Tenn. Gas Pipeline Co. v. FERC, 400 F.3d 23 (D.C. Cir. 2005).

121. 100 F.E.R.C. ¶ 61,268, at P 16.

The Commission did not wait for the NAESB to conclude its proceedings before issuing its final order limited in application to Tennessee's pipeline.[122] In doing so, the Commission stated it would "take time to consider NAESB's report on standardization before considering how to proceed with any unresolved creditworthiness issues."[123]

2. Adoption through Policy Statements

As a means of announcing its tentative intentions for the future,[124] the Commission may also initiate a policy statement proceeding indicating its intent to adopt the NAESB standards.[125] This approach permits the Commission to hold technical conferences and solicit public comments prior to making a policy pronouncement. It also fosters a robust regulator/industry dialogue.

Policy statement proceedings are not covered by the APA,[126] and are explicitly exempted from its mandates.[127] Policy statements have been likened to press releases[128] since they announce a government policy but do not impose any rights and obligations on the public.[129] The District of Columbia Circuit dismissed a challenge to the Federal Power Commission's pipeline curtailment policy on the grounds that a general statement of policy does not have a legally immediate impact upon parties until it is applied in case-by-case adjudicatory proceedings. The District of Columbia Circuit in *Pacific Gas & Electric Co. v. FPC* discussed the pros and cons of policy statements as follows:

> As an informational device, the general statement of policy serves several beneficial functions. By providing a formal method by which an agency can express its views, the general statement of policy encourages public dissemination of the agency's policies prior to their actual application in particular situations. Thus the agency's initial views do not remain secret but are disclosed well in advance of their actual application. Additionally, the publication of a general statement of policy facilitates long range planning within the regulated industry and promotes uniformity in areas of national concern.
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> A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A

122. The Commission issued its final order on rehearing on June 4, 2003. *Tennessee Gas Pipeline Co.*, 103 F.E.R.C. ¶ 61,275 (2003). The NAESB submitted its final ratified creditworthiness standards to the Commission on June 16, 2003. Notice of Proposed Rulemaking, *Creditworthiness Standards for Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 32,573 at 5, 69 Fed. Reg. 8587 (2004).

123. 103 F.E.R.C. ¶ 61,275, at P 13.

124. Pac. Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

125. The NAESB's standards are not the only industry standards that have been adopted through policy statements. *See, e.g.*, *Post-Employment Benefits Other Than Pensions*, 61 F.E.R.C. ¶ 61,330, at p. 62,200 (1992) (adopting standards of the Financial Accounting Standards Board (FASB)).

126. *Pac. Gas*, 506 F.2d at 35.

127. 5 U.S.C. §§ 553(b)(A), 553(d)(2) (2000) (exempting statements of policy from rulemaking mandates).

128. *Pac. Gas*, 506 F.2d at 38 (noting "[a] general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications"). One federal agency has actually announced newly developed policy through the issuance of a press release. Airport Comm'n of Forsyth County v. Civil Aeronautics Bd., 300 F.2d 185 (4th Cir. 1962).

129. Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3d Cir. 1969).

> policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.[130]

In sum, a policy statement only has a prospective effect and leaves the decision makers free to exercise their discretion in case-by-case proceedings.[131] The policy statement approach can often gloss over factual distinctions or regional differences that drive case-by-case adjudications. The Commission has recognized this limitation and often treated its policy statements as establishing a rebuttable presumption rather than a firm and enforceable rule.[132]

Two years after its order on the merits in *Tennessee Gas Pipeline Co.*, the Commission issued a policy statement providing the industry "with guidance as to the Commission's credit policies and the way in which the Commission will examine future proceedings in which creditworthiness issues are considered."[133] The Commission had contemplated promulgation of an enforceable uniform creditworthiness rule before it finally issued the statement of policy.[134] In rejecting a rule, the Commission concluded "that standardizing the creditworthiness process beyond the business practices adopted by NAESB is not necessary at this time and that creditworthiness issues that arise in individual filings can be addressed on a case-by-case basis."[135] Nevertheless, the policy statement served a useful purpose, as it offered guidance to the industry beyond the facts of the case involving Tennessee Gas Pipeline.

3. Adoption through Rulemaking Proceedings, Administrative Procedures Act Section 553

The strongest and broadest means of adopting private industry consensus standards involves the administrative rulemaking proceeding. The specific notice and comment requirements governing rulemaking proceedings are

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130. Pac. Gas & Elec. Co. v. FPC, 506 F.2d 33, 38–39 (D.C. Cir. 1974) (citations and footnotes omitted); *see also* Dow Chem., USA v. Consumer Prod. Safety Comm'n, 464 F. Supp. 904, 909–10 (W.D. La. 1979) (codifying several judicial principles that can be used to distinguish a policy statement from a rule).

131. Chamber of Commerce of the United States v. Dep't of Labor, 174 F.3d 206, 212 (D.C. Cir. 1999).

132. *See, e.g, Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 F.E.R.C. ¶ 61,168, at p. 61,590 (1992) (referencing a rebuttable presumption that recently-adjudicated rates are just and reasonable, and appropriate for use as starting rates in an incentive-type filing); Statement of Policy Respecting Take or Pay Provisions in Gas Purchase Contracts: Statement of General Policy to Implement the Economic Stabalization Act of 1970, 47 Fed. Reg. 57,269 (1982) (codified at 18 C.F.R. § 2.103(a)) (provisions of general policy regarding prepayments for natural gas pursuant to take or pay provision in pre-1982 gas contracts do not establish a binding norm but instead provide general guidance). 18 C.F.R. § 2.103(b) (stating that the Commission intends to apply a rebuttable presumption in general rate cases that prepayments to producers under post-1982 gas contracts will not be given rate base treatment under certain circumstances).

133. *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, F.E.R.C. STATS. & REGS. ¶ 31,191 at P 6, 70 Fed. Reg. 37,717 (2005) (codified at 18 C.F.R. pt. 284).

134. Notice of Proposed Rulemaking, *Creditworthiness Standards for Interstate Natural Gas* Pipelines, F.E.R.C. STATS. & REGS. ¶ 32,573, 69 Fed. Reg. 8,587 (2004) (codified at 18 C.F.R. pt. 284).

135. *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, F.E.R.C. STATS. & REGS. ¶ 31,191 at P 6, 70 Fed. Reg. 37,717 (2004) (codified at 18 C.F.R. pt. 284).

contained in section 553 of the APA.[136] Rulemaking determines the binding nature of a standard in one proceeding, and requires all affected entities to implement the new standard within a specified time.[137] The resulting order or regulation is codified and may override any prior contradictory determinations made in case-by-case adjudications. As a codified regulation, the standard also ensures full compliance, uniformity, and enforceability.

In *Pacific Gas*, the Court articulated the distinctions among rulemaking, which is binding on all regulated entities, adjudication, and a general statement of policy adopted without public participation, on a regulated entity, in the following terms:

> An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent, but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.[138]

Because a substantive rulemaking establishes a standard of conduct which has the force of law, its procedures under APA § 553 are strictly enforced.[139]

The rulemaking proceeding, with its mandatory notice and comment provisions, can be time consuming and lengthy. This method has been criticized as inflexible or unresponsive to quickly evolving business and market developments. Despite these limitations, the FERC has indicated a preference for rulemaking, with its ample notice and comment provisions and force of law, as a means of incorporating NAESB standards by reference.[140]

For the past decade, under the leadership of Chairs Allday, Moler, Hoecker, and Wood, the FERC has incorporated the GISB's and the NAESB's wholesale gas standards into its Part 284 regulations[141] through rulemaking docket RM96-1-000 et al.[142] The NAESB published its most recent version, WGQ Version 1.7,

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136. Administrative Procedure Act, 5 U.S.C. § 553 (2000).

137. Of course, companies regulated by the FERC can later challenge a final rule when the rule is applied against that company in a case-by-case adjudication. *See, e.g.*, Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys., 195 F.3d 28, 34–35 (D.C. Cir. 1999).

138. Pac. Gas & Elec. Co. v. FPC, 506 F.2d 33, 38–39 (D.C. Cir. 1974) (citations and footnotes omitted); *see also* Limerick Ecology Action v. U.S. Nuclear Regulatory Comm'n, 869 F.2d 719 (3d Cir. 1989) (declaring agency "policy statement" to be a binding rule upon examination).

139. *See* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946–47 (D.C. Cir. 1987) (requiring enforceable contamination action levels to be subject to formal notice and comment requirements of section 553 despite FDA labeling them policy statements).

140. Order Providing Guidance on the Formation of a Standards Development Organization for the Wholesale Electric Industry, *Electricity Market Design and Structure*, 97 F.E.R.C. ¶ 61,289 (2001) (discussing the process of using rulemaking procedures to incorporate the GISB standards and resolution of policy disputes by the FERC).

141. Standards for Business Practices of Interstate Natural Gas Pipelines, 18 C.F.R. § 284.12 (2005).

142. Order No. 587, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,038, 61 Fed. Reg. 39,053 (1996) (to be codified at 18 C.F.R. pts. 161, 250, 284); Order No. 587-B, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,046, 62 Fed. Reg. 5521 (1997) (to be codified at 18 C.F.R. pt. 284); Order No. 587-C, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,050, 62 Fed. Reg. 10,684 (1997) (to be codified at 18 C.F.R. pt. 284); Order No. 587-G, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,062, 63 Fed. Reg. 20,072 (1998) (to be codified at 18 C.F.R. pt. 284); Order No. 587-H, *Standards for Business Practices of Interstate Natural Gas Pipelines*,

on December 31, 2003, and transmitted it to the FERC on April 14, 2004.[143] After the NAESB published standards implementing FERC Order 2004,[144] and standards implementing gas quality reporting requirements,[145] the FERC issued a NOPR on December 21, 2004 proposing to incorporate these three sets of standards by reference into its interstate pipeline regulations.[146]

The NOPR sought to continue the process of updating and improving the previously incorporated business practice and communications standards. The NOPR also, for the first time, sought to standardize FERC's business practice regulations regarding the posting of information on the Internet across the natural gas and electric industries by suggesting a modification to the WGQ standards to conform them to the WEQ standards.[147] The Commission made reference to the NAESB's consensus procedures, balanced voting requirements, and broad spectrum of support from all segments of the industry as ensuring the reasonableness of these voluntary industry standards becoming mandatory. The Commission also referenced the congressional mandates placed on it by the NTTAA, and the presidential mandates contained in OMB Circular A-119.[148]

F.E.R.C. STATS. & REGS. ¶ 31,063, 63 Fed. Reg. 39,509 (1998) (to be codified at 18 C.F.R. pt. 284); Order No. 587-I, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,067, 63 Fed. Reg. 53,565 (1998) (to be codified at 18 C.F.R. pt. 284); Order No. 587-K, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,072, 64 Fed. Reg. 17,276 (1999) (to be codified at 18 C.F.R. pt. 284); Order No. 587-M, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,114, 65 Fed. Reg. 77,285 (2000) (to be codified at 18 C.F.R. pt. 284); Order No. 587-N, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,125, 67 Fed. Reg. 11,906 (2002) (to be codified at 18 C.F.R. pt. 284); Order No. 587-O, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,129, 67 Fed. Reg. 30,788 (2002) (to be codified at 18 C.F.R. pt. 284); Order No. 587-R, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,141, 68 Fed. Reg. 13,813 (2003) (to be codified at 18 C.F.R. pt. 284).

143. Due to the copyrighted nature of the NAESB's standards, the NAESB does not file the standards themselves in the public docket. Rather, the NAESB's submission contains a summary of the standards and copies of the proceedings and votes leading to their ratification. The standards are provided to Commission staff for their internal use and are available for viewing at the FERC's public reference room. Administrative Procedure Act, 5 U.S.C. § 552(a)(1) (2004) (stating "[m]atter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register"); 1 C.F.R. § 51 (2005) (providing regulations governing agency incorporation by reference); Order No. 587-S, *supra* note 88. "Because these [NAESB] standards are copyrighted, reproducing them in the regulations is not appropriate." *Id.* at P 36. *See also* Veeck v. S. Bldg. Code Cong. Int'l Inc., 241 F.3d 398 (5th Cir. 2001) (upholding organization's copyrights where its building codes were adopted as regulatory mandates by municipalities).

144. Order No. 2004, *Standards of Conduct for Transmission Providers*, F.E.R.C. STATS. & REGS. ¶ 31,155, 68 Fed. Reg. 69,134 (2003) (to be codified at 18 C.F.R. pts. 37, 161, 250, 284, 358); Order No. 2004-A, *supra* note 85; Order No. 2004-B, *Standards of Conduct for Transmission Providers,* F.E.R.C. STATS. & REGS. ¶ 31,166, 69 Fed. Reg. 48,371 (2004) (to be codified at 18 C.F.R. pts. 37, 161, 250, 284, 358).

145. The NAESB's standards implementing Order 2004 were published on June 25, 2004 and subsequently modified on May 3, 2005. The gas quality reporting standards were drafted pursuant to Request for Standards R03035A and published by the NAESB on October 20, 2004. Both sets of standards will be integrated into WGQ Version 1.8.

146. Notice of Proposed Rulemaking, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 32,578, 70 Fed. Reg. 319 (2005).

147. The NOPR stated that the posting of voluntary consent to information disclosure by non-affiliated customers, as required by Order 2004-A, was best done as a separate category. Since the affiliate requirements of Order 2004-A apply to both interstate pipelines and electric utilities, the Commission found that locating information in a similar manner across the industries would benefit both the Commission and common users of these web sites. *Id.*

148. Notice of Proposed Rulemaking, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 32,578, 70 Fed. Reg. 319 (2005).

Five months later, after several interested parties submitted comments to the FERC, the Commission issued its final rule in Order 587-S.[149] The comments generally supported adoption of the standards. The Commission addressed the few concerns raised by commenters, and rendered its independent decision to adopt the standards without further modifications.[150] Where some commenters sought exemptions, the Commission left the door open for them to request such exemptions on a case-by-case basis in individual adjudicatory proceedings.[151] Where other commenters sought to expand the WGQ standards, the Commission suggested their proposals would be better addressed in the context of the on-going gas interchangeability policymaking proceeding.[152] Interstate pipelines were given over ninty days to implement the new requirements consistent with the provisions of the APA.[153]

The Commission has recently indicated that it will be taking a similar rulemaking approach towards incorporating the NAESB's first set of wholesale electric standards.[154]

IV. CONCLUSION AND LESSONS FOR THE FUTURE

Regulatory agencies have two options for making industry consensus standards mandatory for the entities they regulate. The first is the subdelegation of congressional statutory authority to a private organization when the agency maintains firm oversight and final review of the organization's actions, and when the subdelegation is consistent with legislative intent. The second is the incorporation by reference of a voluntary consensus body's standards into the agency's regulations and mandates when consistent with the agency's mission, authority and budget resources. Both options have withstood a variety of challenges and remain viable tools for regulatory agencies to implement their policies.

When making the GISB's, and now the NAESB's, international consensus-based industry standards mandatory for the entities it regulates, the FERC has

149. Order No. 587-S, *supra* note 88. The Commission subsequently issued an unpublished errata notice on June 14, 2005, changing the order number from 654 to 587-S.

150. *Cf.* Gas Appliance Mfrs. Ass'n v. Sec'y of Energy, 722 F. Supp. 792 (D.C. Cir. 1989). The Court rejected the DOE's adoption of water heater efficiency standards developed by American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) because the agency (i) adopted regulations that diverged from industry standards without justifying its reasons for diverging, and (ii) failed to respond to adverse comments submitted by the Gas Appliance Manufacturers Association (GAMA) representing one segment of industry participating in development of standard.

151. Order 587-S, *supra* note 88. Request of INGAA for extension of time to implement order and request of Total Peaking for a blanket exemption for LNG storage facilities that do not physically deliver gas to pipelines.

152. *Id.* Request of FPL for additional gas quality measurement standardization and request of BP for application of Natural Gas Pipeline Co. standards to entire industry.

153. The Commission set a September 1, 2005 deadline for implementation. Order 587-S, *supra* note 88.

154. Notice of Proposed Rulemaking, *Standards for Business Practices and Communications Protocols for Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 32,582, 70 Fed. Reg. 28,222 (2005). Notice of proposed rulemaking proposing incorporation of NAESB's WEQ Open Access Same-Time Information Systems (OASIS) business practice standards, including posting requirements for FERC Order 2003 generator interconnection agreements and procedures, OASIS Standards and Communications Protocols and Data Dictionary, and business practice standards for Coordinate Interchange, Area Control Error (ACE) Equation Special Cases, Manual Time Error Correction, and Inadvertent Interchange Payback that complement NERC's Version 0 Reliability Standards).

rejected the first option and embraced the second. Indeed, the President through OMB Circular A-119, and the Congress through NTTAA § 12(d), have signaled a preference for the incorporation by reference option. The Commission has followed this preference through a variety of mechanisms, but most often through an APA § 553 rulemaking process.

Having the legal option available, however, does not guaranteed success. The standards being incorporated should come from a private industry standards developing organization that is founded on principles of openness and the broadest possible participation from every segment of the industry, and uses balanced voting and avoids advocacy of regulatory agencies. While the development of consensus-based standards does not mean unanimity, it does require adherence to these principles to ensure that all views are considered, whether or not they are adopted. The organization's structure and governance should ensure that no single segment of the industry can dominate the process, and that truly consensus-based solutions are the end result. A consensus-based process also affords industry an opportunity to take control of its future by developing standards it can live with, before the regulators, who are often not as expert in the technical details of the electric or gas industries, and subject to less-predicable political considerations, force a potentially less optimal solution on them. The NAESB's process is not the only one available for energy industry standards development, and the organization does not possess exclusive government delegated authority to develop such standards. Nevertheless, this article has demonstrated that the NAESB's model of organizational structure, governing process and public-private partnership constitutes one such consensus-based organization.

Consistent with the objectives of OMB Circular A-119 and the NTTAA, the incorporation of industry standards also permits the Commission to benefit from expertise in the private sector, reduce the cost of developing government standards, and promote the efficiency and economic competition through harmonization of standards. Most regulatory agencies would be hard pressed to develop their own technical standards that can better implement their policies, that will have a greater degree of consensus, and that will be more widely accepted by the natural gas and electric industries.

Over the years, the GISB, and later the NAESB, have earned the trust and respect of both the industry and the regulated community. After eleven years of standards development, first as the GISB and now as the NAESB, the organization has also earned the trust, respect and acknowledgement that come with a successful track record of reducing transaction costs through voluntary consensus standardization. The same credibility that permits industry standards to withstand legal challenge is why entities not regulated by the FERC and the retail industries chose to adopt NAESB standards on a voluntary basis.