

**A Case Study of Separation of Powers in the Energy Law Context:
The National Technology Transfer and Advancement Act and Its Impact on the Federal
Energy Regulatory Commission's Relationship with the North American Energy Standards
Board**

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The Federal Energy Regulatory Commission (FERC) relies on a variety of standards developing organizations to establish national or continent-wide standards for various aspects of doing business on the power grid.¹ Two of the most prominent standards developing organizations related to FERC's promulgation of new rules are the North American Electric Reliability Corporation (NERC) and the North American Energy Standards Board (NAESB).² In 2005, Congress passed legislation specifically directing FERC to defer to the technical judgment of NERC when developing reliability standards.³ Congress also established the standard for review FERC should use when determining whether to adopt NERC standards.⁴ Similarly in 2007, Congress passed the Energy Independence and Security Act (EISA) specifically directing FERC to rely on standards developing organizations for the new Smart Grid Standards and Protocols.⁵

Congress has not passed legislation explicitly directing FERC to rely on NAESB in the areas of energy markets and transmission service regulation. Nevertheless, FERC routinely adopts NAESB developed standards as if it had the same legislative directive as NERC.⁶ In such

¹ Memorandum from Matthew Goldberg, Director, Reliability and Operations and Compliance Group at ISO New England Inc. on the National Technology Transfer and Advancement Act of 1995 (NTT&AA) and Federal Agency Reliance on the Act for Promulgating New Regulations (June 6, 2011).

² *Id.*

³ Federal Power Act of 1920, § 215 (as amended by the Energy Policy Act of 2005), 16 U.S.C. § 824o (2006).

⁴ *Id.*

⁵ Energy Independence and Security Act of 2007 § 1303, 15 U.S.C.A. § 17383 (West 2011).

⁶ 131 FERC ¶ 61,022 (2010); FERC Statutes and Regulations, Standards for Business Practices of Interstate Natural Gas Pipelines, 68 FR 13814, [¶ 31,141]; Standards for Business Practices and Communication Protocols for Public Utilities, FERC Order No. 676 (2006); Standards for Business Practices and Communication Protocols for Public Utilities, 129 FERC ¶ 61,162 (2009).

cases, FERC cites the National Technology and Advancement Act of 1995 (NTT&AA), explaining that NTT&AA is indicative of Congress' desire for federal agencies to adopt voluntary consensus standards that are developed by private standards developing organizations.⁷ FERC also maintains that government agencies had been relying on private sector standards for regulatory purposes long before the passage of NTT&AA.⁸ However, FERC does not include any explanation as to what legitimized this method of standards development in the first place.⁹ Still, FERC asserts that regardless of NTT&AA, when private sector standards serve to further regulatory goals, there is no impediment to FERC adopting these standards.¹⁰

A close analysis of the NTT&AA act tells us that Congress does not mandate that FERC *must* use standards developing organizations such as NAESB in standards creation.¹¹ In essence, NTT&AA only requires that: “[F]ederal agencies *should* use non-government standards unless these standards are inconsistent with applicable law or otherwise impractical.”¹² There is actually no explicit statement that says an agency must use voluntary consensus standards such as those created by NAESB.¹³ Furthermore, the OMB Circular A-119 (Whitehouse Circular detailing the implementation of NTT&AA) definition of a “Federal Agency” exempts “independent regulatory commissions.”¹⁴ As FERC defines itself as “an *independent agency* that regulates the interstate transmission of electricity, natural gas, and oil,” FERC as an independent agency does not fall under the auspices of the NTT&AA.¹⁵ Without this explicit directive from Congress the constitutionality of FERC’s adoption of NAESB standards is questionable. Legal scholars have

⁷ *Id.*

⁸ *Standards for Business Practice and Communication Protocols for Public Utilities*, 131 FERC ¶ 61,022 (2010).

⁹ *Id.*

¹⁰ *Id.*

¹¹ National Technology Transfer and Advancement Act of 1995 § 12, 15 U.S.C. § 272(b) (2006).

¹² *Id.* (emphasis added).

¹³ *Id.*

¹⁴ OMB-Circular A-119 (1998).

¹⁵ *What FERC Does*, FEDERAL ENERGY REGULATORY COMMISSION (FERC) (Aug. 4, 2011), <http://www.ferc.gov/about/ferc-does.asp>.

pointed out that Article I of the U.S. Constitution requires that Congress and not some other body create US law.¹⁶ Thus, courts have viewed the act of delegating legislative functions to private entities with close scrutiny.¹⁷

Courts Review of Agency Reliance on Private Standard Development Organizations

Even though FERC does not fall under NTT&AA, there are legal precedents that assert that agencies, including FERC, may adopt voluntary consensus standards from a standards-creating body such as NAESB.¹⁸ Before the passage of NTT&AA, Mishkin and Adelman did a study of the constitutionality of statutory delegation to private standards-setting organizations and found that: “[n]o judicial decisions in which an agency’s reliance on actions taken by a private standards-setting organization was successfully challenged based on the absence of explicit statutory delegation authority.”¹⁹ Therefore, although a congressional mandate will insure the constitutionality of an agency’s delegation to private standards-setting organizations, this does not imply that the absence of an explicit Congressional mandate inversely makes it unconstitutional for these agencies to delegate to private standards-setting organizations. What then are the factors that sway courts to find agencies to be either improperly or properly delegating to private standards-setting organizations?

If a federal agency has “authority and surveillance over the activities” of the standards developing organization then this delegation is constitutional.²⁰ A federal agency may validly

¹⁶ Michael T. Mishkin & David I. Adelman, GAS INDUSTRY STANDARDS BOARD: LEGAL CONSIDERATIONS IN THE STANDARD SETTING PROCESS, 15 Energy L. J. 73, 77 (1994).

¹⁷ See *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); *National Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999); *Noblecraft Industries, Inc. v. Secretary of Labor*, 614 F.2d 199 (9th Cir. 1980); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (U.S. 1940); *Currin v. Wallace*, 306 U.S.1 (1939).

¹⁸ See *United States Telecom Ass’n*, 359 F.3d 554; *National Park & Conservation Ass’n*, 54 F. Supp. 2d 7; *Noblecraft Industries, Inc.*, 614 F.2d 199; *Sunshine Anthracite Coal Co.*, 310 U.S. 381; *Currin*, 306 U.S. 1.

¹⁹ Michael T. Mishkin & David I. Adelman, *Gas Industry Standards Board: Legal Considerations in the Standard Setting Process*, 15 ENERGY L. J. 73, 77 (1994).

²⁰ *Sunshine Anthracite Coal Co.*, 310 U.S. at 399.

delegate to private parties if it retains its “final reviewing authority.”²¹ A federal agency is deemed to have retained this “final reviewing authority” if it meets the following requirements: (1) it shows “apparent discrimination” in selecting among the standards developed²²; (2) it maintains a “notice-and-comment” period per the Administrative Procedure Act ²³; (3) it retains the power to approve or disapprove rules²⁴; and (4) it fulfills all statutorily mandated roles²⁵. Furthermore, a federal agency cannot allow the standards developing organization to “administer” or “manage” the agency²⁶ but may only use privately developed standards which either “establish a reasonable condition for granting federal approval” or serve a “fact gathering” or an “advice giving” role.²⁷ Courts demand actual oversight as they are intolerant of “vague and unclear” assertions of reviewing authority²⁸ or signs of “rubber stamping” standards without actual review. ²⁹ Finally, one may not put lawmaking in the hands of industry³⁰ unless the paradigm of “just and reasonable” guides the standards making process.³¹

What constitutes consensus for a Standard Development Organization?

True consensus in the standards making process between all affected parties insures that one sector of industry does not dominate the standards making process. FERC argues that consensus standards assure the “just and reasonable” nature of the standard developing organizations to

²¹ *National Park & Conservation Ass’n*, 54 F. Supp. 2d at 19; *See Currin*, 306 U.S. at 449; *Sunshine Anthracite Coal Co.*, 310 U.S. at 399.

²² *Noblecraft Industries, Inc.*, 614 F.2d at 9.

²³ *National Park & Conservation Ass’n*, 54 F. Supp. 2d at 21.

²⁴ *Id.* at 33.

²⁵ *Id.* at 37.

²⁶ *Id.* at 32.

²⁷ *United States Telecom Ass’n*, 359 F.3d at 24.

²⁸ *National Park & Conservation Ass’n*, 54 F. Supp. 2d at 39.

²⁹ *United States Telecom Ass’n*, 359 F.3d at 28.

³⁰ *Sunshine Anthracite Coal Co.*, 310 U.S. at 399.

³¹ *Sunshine Anthracite Coal Co.*, 310 U.S. at 398.

which federal agencies are delegating.³² The agency must adopt a standard that is developed “under procedures which have given diverse views an opportunity to be considered and which indicate that interested and affected persons have reached substantial agreement on its adoption”³³ Courts have found delegation actions unconstitutional where there was an imbalance among the standards developing organizations membership, as private interests heavily outweighed environmental interests.³⁴ An agency can choose between available privately developed standards but these standards must be considered consensus standards and if alterations by the agency change the nature of the standard such that it no longer represents the industry wide consensual agreement then it is no longer a valid standard.³⁵

FERC does maintain a rigorous standard for the level of consensus of its adopted standards. In a recent FERC order, the Commission rejected standards created by the National Institute of Standards and Technology stating that there was a need for more representation from different sectors of industry before the standards could be adopted.³⁶ However, this standard of review still may not be high enough. NAESB is a fairly new organization, founded in 2002, which may not yet have a fully developed, well-rounded industry representation.³⁷ This is suggested by the fact that Congress has mandated FERC deference to NAESB’s twin NERC’s technical judgment³⁸ yet has failed to mandate this same deference to NAESB’s judgment.

³² 131 FERC ¶ 61,022 (2010); FERC Statutes and Regulations, Standards for Business Practices of Interstate Natural Gas Pipelines, 68 FR 13814, [¶ 31,141]; Standards for Business Practices and Communication Protocols for Public Utilities, FERC Order No. 676 (2006); Standards for Business Practices and Communication Protocols for Public Utilities, 129 FERC ¶ 61,162 (2009).

³³ *Deering Milliken, Inc., Unity Plant v. Occupational Safety & Health Reviww Com.*, 630 F.2d 1094 (5th Cir. 1980).

³⁴ *National Park & Conservation Ass’n*, 54 F. Supp. 2d at 37.

³⁵ *Noblecraft Industries, Inc.*, 614 F.2d at 3.

³⁶ *United States of America Federal Energy Regulatory Commission [Docket No. RM11-2-000] Smart Grid Interoperability Standards*, 136 FERC ¶ 61,039 (Issued July 19, 2011).

³⁷ North America Energy Standards Board, NAESB.org (last visited Nov. 7, 2011).

³⁸ Federal Power Act (1920) §215 (as amended by the Energy Policy Act of 2005).

Because congress has not statutorily mandated the standard of review FERC should adhere to when adopting NAESB standards, FERC must meet the standard of review found to be appropriate in relevant case law³⁹ With adoption by reference (incorporating privately developed standards into the agencies own regulations and mandates) NAESB serves the “advice giving” role as outlined as constitutional in *U.S. Telecom Ass’n v. FCC*.⁴⁰ Additionally, FERC has supplemented consensus standards where it has found the NAEB standards insufficient.⁴¹ For example, certain NAESB standards meant to improve the coordination and communication between the gas and electric industries were incorporated in FERC Order No. 698.⁴² Before these standards were inserted into the Commission’s regulations, the Commission conducted its own independent review and decided to amend NAESB standards slightly by making two exceptions.⁴³ The FERC rulemaking proceedings includes mandatory notice and comment provisions to insure that all affected parties have a chance to be heard before standards that affect them are established with the force of law.⁴⁴ Finally, should affected parties still have issues with FERC’s adopted standards they may request exemptions on a case-by-case basis through adjudicatory proceedings.⁴⁵

The fact that Congress has not passed an act explicitly telling FERC to rely on NAESB standards could imply that NAESB standards have not reached the level of true consensus necessary for Congress to consider its decision making process inherently “just and

³⁹ See *United States Telecom Ass’n*, 359 F.3d at 28; *National Park & Conservation Ass’n*, 54 F. Supp. 2d at 35; *Sunshine Anthracite Coal Co.*, 310 U.S. at 399.

⁴⁰ *United States Telecom Ass’n*, 359 F.3d at 24.

⁴¹ William P. Boswell & James P. Cargas, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization*, 27 ENERGY L.J. 147, 163 (2006).

⁴² *Standards for Business Practices and Communication Protocols for Public Utilities*, FERC Order No. 698 (2007).

⁴³ *Id.*

⁴⁴ Boswell & Cargas, *supra* note 38.

⁴⁵ 131 FERC ¶ 61,022 (2010).

reasonable.”⁴⁶ Without this explicit Congressional mandate it is only constitutional for FERC to delegate to NAESB if (1) FERC maintains final reviewing authority⁴⁷ and (2) NAESB develops balanced and equal representation among its membership.⁴⁸ While it has been determined that FERC maintains the appropriate level of reviewing authority, at these early stages of NAESB’s development it is unclear that NAESB truly has industry consensus within its membership. If NAESB is not found to have industry consensus then it is currently improper and unconstitutional for FERC to delegate standards development to NAESB.

⁴⁶ *Sunshine Anthracite Coal Co.*, 310 U.S. at 398; 131 FERC ¶ 61,022 (2010); *FERC Statutes and Regulations, Standards for Business Practices of Interstate Natural Gas Pipelines*, 68 FR 13814, [¶ 31,141]; *Standards for Business Practices and Communication Protocols for Public Utilities*, FERC Order No. 676 (2006); *Standards for Business Practices and Communication Protocols for Public Utilities*, 129 FERC ¶ 61,162 (2009).

⁴⁷ *National Park & Conservation Ass’n*, 54 F. Supp. 2d at 19; *See Currin*, 306 U.S. at 449; *Sunshine Anthracite Coal Co.*, 310 U.S. at 399.

⁴⁸ *National Park & Conservation Ass’n*, 54 F. Supp. 2d at 37.