
Speeches

Ensuring Reliability and a Fair Energy Marketplace*

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ABSTRACT

In response to the Western Energy Crisis, the Enron scandal, and a historic East Coast blackout, Congress granted broad new authority to the Federal Energy Regulatory Commission (“FERC” or “the Commission”) in 2005. Armed with this enforcement authority and additional analytical resources, FERC has in recent years engaged in high-profile enforcement efforts intended to bolster both energy availability and confidence in a fair marketplace. Adapted from a speech given to the University of Colorado

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Law School, the following Article provides the thoughts of FERC Commissioner Tony Clark on lessons learned since the passage of the Energy Policy Act of 2005, and recent FERC actions that illustrate the evolution of FERC enforcement since the passage of that pioneering Act.

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I. INTRODUCTION

In the summer of 2013, an anniversary came and went with little fanfare in the media; but for those of us involved in the energy regulatory world, it offered perhaps a bit more on which to reflect. That year marked the ten-year anniversary of the Northeast Blackout, in which fifty million people were impacted from the northeast United States through the Midwest and into Canada.¹ This historic blackout took place only about two years after the meltdown of Enron and revelations of its extensive manipulation of energy markets in the western U.S.

These two events created the legislative impetus and political will to overhaul energy regulation. These events, more than any others, were *the* watershed events that changed how we oversee the energy industry in the United States. The legislation was the Energy Policy Act of 2005, or EAct 2005,² and it dramatically changed the Federal Energy Regulatory Commission's ability to enforce laws related to reliability and market manipulation.

FERC's enforcement program prior to EAct 2005 was limited in its effectiveness due to the absence of authority to impose meaningful civil penalties to enforce the Natural Gas Act and the Federal Power Act. EAct 2005 cured those deficiencies by amending the Federal Power Act and the Natural Gas Act to enhance the Commission's civil penalty authority from \$10,000 per day per violation to \$1 million per day per violation of any provision, rule, or order of the Commission.³ EAct 2005 also explicitly prohibited market manipulation, borrowing language from the Securities and Exchange Commission's long-standing Rule 10b-5.⁴

In this time of dysfunction in Washington, D.C., it is easy to forget that, in fact, government can work to address pressing issues in a meaningful way to the benefit of the American people. It did not happen overnight, of course. Few things do in Washington. Two years went by between the blackout and the passage of EAct 2005, and yet the fact that the federal government did act is a testament to the impact of the two pivotal events of the early 2000s.

1. Jaime Holguin, *Biggest Blackout in U.S. History*, CBS/AP (Aug. 15, 2003), <http://www.cbsnews.com/news/biggest-blackout-in-us-history/>.

2. The Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211(a), 119 Stat. 594,941 (codified at 16 U.S.C. § 824o (2005)).

3. See Press Release, FERC, Commission Finalizes Rule Barring Market Manipulation (Jan. 19, 2006), *available at* <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10932496>.

4. *Id.*

EPA 2005 passed with strong bipartisan support, from 200 Republicans and seventy-five Democrats in the House,⁵ and forty-eight Republicans and thirty-six Democrats in the Senate.⁶ On August 8, 2005, President George W. Bush signed the legislation,⁷ and since then it has been actively and appropriately administered by both a Democrat- and Republican-majority FERC. In almost all enforcement proceedings, regardless of which party held the Chairman's seat, a unanimous coalition of Democrat and Republican Commissioners has approved orders assessing civil penalties or accepting settlements between subjects of an investigation and the Office of Enforcement.

So with this history as a backdrop, I will focus on two areas in particular: reliability and market manipulation. In so doing, I will describe some of the nuts and bolts of FERC's work. But at the same time, I hope to provide a bit of a retrospective into some of the lessons I hope we are learning along the way—both as regulators and as regulated industry.

II. RELIABILITY

Let us start with reliability, and I will begin with full disclosure: this is not fancy stuff. This is the basic blocking and tackling of the utility world. But this is very important stuff. This is about keeping the lights on. It is about health and public safety. It is about the very lifeblood of the American economy and modern life.

After the Northeast Blackout, a joint U.S.-Canada task force studied the causes and effects of the 2003 blackout and identified the need to make reliability standards mandatory and enforceable with penalties for noncompliance. So, in EPA 2005, Congress entrusted FERC with a major new responsibility to oversee mandatory, enforceable reliability standards for the nation's Bulk Power System—that is, the wholesale power grid. The importance of this change cannot be overstated. The business of reliability became not just a set of industry best practices; it became a matter of national importance, underscored by mandatory rules enforceable by significant penalties.

But Congress did not draw a straight line between FERC and its standard setting and enforcement authority. Congress created an

5. 151 CONG. REC. H6949, 6972 (daily ed. July 28, 2005), *available at* <https://www.govtrack.us/congress/votes/109-2005/h445>.

6. 151 CONG. REC. S7451, 7477 (daily ed. June 28, 2005), *available at* <https://www.govtrack.us/congress/votes/109-2005/s158>.

7. Statement on Signing the Energy Policy Act of 2005, 2 PUB. PAPERS 1315 (Aug. 8, 2005), *available at* <http://www.presidency.ucsb.edu/ws/?pid=64861>.

interesting creature now known as the FERC-NERC process. Through Section 215 of the Federal Power Act, Congress authorized FERC to certify a national electric reliability organization, or ERO.⁸ That ERO is the North American Electric Reliability Corporation, better known as NERC.⁹

NERC is a not-for-profit entity whose mission is to ensure the reliability of the Bulk Power System in North America.¹⁰ What does that mean? It means that NERC develops and enforces Reliability Standards; annually assesses seasonal and long-term reliability; monitors the Bulk Power System through system awareness; and educates, trains, and certifies industry personnel.

While FERC can direct NERC to take up certain matters, it is NERC that develops the standards.¹¹ FERC can ultimately approve them—making them mandatory and enforceable—or reject them, but it cannot unilaterally implement or amend them.¹²

To give a high level overview of what these mandatory Reliability Standards cover, they collectively define overall acceptable performance with regard to operation, planning, and design of the North American Bulk Power System. Some of the Reliability Standards focus on how utilities prepare their employees and their systems for emergency events like snowstorms or cyber attacks.¹³ The vegetation management standards

8. The Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211(a), 119 Stat. 594,941 (codified at 16 U.S.C. 824o (2005)); Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards, Order No. 672, 114 FERC ¶ 61,104 (2006) (codified at 18 C.F.R. pt. 39), *order on reh'g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006) (codified at 18 C.F.R. pt. 39). On February 3, 2006, the Commission issued Order No. 672 to implement the requirements of Section 215 of the FPA. Order No. 672 sets forth the process for certifying a single independent ERO, which will be responsible for proposing and enforcing mandatory Reliability Standards subject to the Commission's review and oversight.

9. N. Am. Elec. Reliability Corp., 116 FERC ¶ 61,062 (2006), *order on reh'g, clarification & compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030 (2006), *order on clarification & reh'g*, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

10. See N. AM. ELEC. RELIABILITY CORP., <http://www.nerc.com> (last visited Feb. 25, 2014).

11. See 16 U.S.C. §§ 824o(a)(2), (d)(1)–(2) (2012).

12. See 16 U.S.C. § 824o(d)(2), (4).

13. See, e.g., Reliability Standard EOP-001-1 (Emergency Operations Planning), available at <http://www.nerc.com/pa/Stand/Reliability%20Standards/EOP-001-1.pdf>; Reliability Standard EOP-006-2 (System Restoration Coordination), available at <http://www.nerc.com/pa/Stand/Reliability%20Standards/EOP-006-2.pdf>; Reliability Standard CIP-003-3 (Cyber Security – Security Management Controls), available at

address the level of tree trimming that utilities must undertake to ensure that transmission lines will be free from danger trees and hazard trees.¹⁴ And yes, there are actually reports and presentations out there dedicated to explaining the difference between danger trees and hazard trees.¹⁵

NERC and FERC (through its Office of Electric Reliability and Office of Enforcement) often work together to investigate severe weather or reliability events that impacted the Bulk Power System and at the end of the investigation issue a report with findings and recommendations for improvements from industry or to the Reliability Standards.¹⁶ It is not uncommon, however, for FERC to undertake separate investigations after a severe weather event and to assess penalties for noncompliance with Reliability Standards by the users, owners, or operators of the Bulk Power System.

But reliability today goes beyond just the physical grid; it extends into the realm of cyber space. Here, too, EAct 2005 has served us well, at least as far as it goes. In February 2013, the President issued an Executive Order titled “Improving Critical Infrastructure

<http://www.nerc.com/files/CIP-003-3.pdf>; Reliability Standard CIP-004-3a (Cyber Security – Personnel & Training), *available at* <http://www.nerc.com/files/CIP-004-3a.pdf>.

14. *See, e.g.*, Reliability Standard FAC-003-1 (Transmission Vegetation Management Program), *available at* <http://www.nerc.com/files/FAC-003-1.pdf>. FERC has no direct role in electric utility plans for tree trimming and vegetation management. FERC approves reliability standards that apply to electric transmission facilities (generally lines above 200,000 volts, or 200 kilovolts). Among these standards is one that requires sufficient clearance be maintained between trees and transmission lines for service reliability and safety purposes. Lower voltage distribution facilities (generally lines below 200 kilovolts) are regulated by the utility regulatory commissions within each state. Individual state regulatory commissions have the authority to set vegetation management standards for distribution lines.

15. As used in the utilities industry context, “hazard trees” are trees that present an imminent danger to transmission lines because they are dead, diseased, or damaged (due to structural defects or other factors) and are within striking distance of the lines. A “danger tree” is any tree that, if it fell, could contact electric supply lines. Regarding utilities, all hazard trees are danger trees, but not all danger trees are hazard trees. *See* AM. NAT’L STANDARDS INST., A300 INTEGRATED VEGETATION MANAGEMENT—PART 7 (2006). The ANSI standards represent the industry criteria for performing tree care operations. *See also* JASON LUBAR, WHAT MAKES A DANGER TREE OR A HAZARD TREE (2013), *available at* <http://www.energypa.org/assets/files/2013%20Calendar/March%202013/Presenter%20Papers/What%20Makes%20a%20Danger%20Tree%20-%20Lubar.pdf>.

16. *See* FERC-NERC, ARIZONA-SOUTHERN CALIFORNIA OUTAGES ON SEPTEMBER 8, 2011 (2012), *available at* <http://www.ferc.gov/legal/staff-reports/04-27-2012-ferc-nerc-report.pdf>; FERC-NERC, TRANSMISSION FACILITY OUTAGES DURING THE NORTHEAST SNOWSTORM OF OCTOBER 29–30, 2011 (2012), *available at* <http://www.ferc.gov/legal/staff-reports/05-31-2012-ne-outage-report.pdf>.

Cybersecurity.”¹⁷ In that Executive Order, President Obama declared that “the cyber threat to critical infrastructure continues to grow and represents one of the most serious national security challenges we must confront.”¹⁸ In that context, an important part of FERC’s current responsibility is to oversee the development of cyber security reliability standards for the Bulk Power System.

In late 2006, NERC proposed the first version of the Critical Infrastructure Protection standards, which we refer to as CIP standards. FERC incorporated these standards into its regulations in 2008.¹⁹ Since then, FERC has directed NERC to make numerous changes to the standards to improve the cyber security protections within those standards.²⁰ Seven years later, FERC is asking industry to implement and come into compliance with the fifth version of the CIP standards.²¹ Just as threats to our electric grid evolve, so must these standards.

With the help of audits and members of industry working with NERC, FERC continues to promote industry best practices to minimize potential vulnerabilities, raise security awareness, and strengthen cyber defense policies and procedures to protect the Bulk Power System from malicious cyber attacks. And while these standards are important first steps, they are far from the be all and end all of cyber security protection. Indeed, a “standard” in the context of cyber security is itself a bit of a misnomer. For as soon as a standard is written in the cyber world, it can become obsolete. Rather, it is probably better to think of what FERC is attempting to do as promoting an ecosystem of security, wherein best practices are instituted to significantly reduce the potential for bad outcomes.

Yet for all its good work, the FERC-NERC iterative process is not well suited to address a fast moving threat. FERC staff testified before Congress shortly after the President issued the Executive Order and stated that FERC’s current legal authority is inadequate to protect against entities

17. Exec. Order No. 13,636, 3 C.F.R. § 11,739 (2013).

18. *Id.*

19. Mandatory Reliability Standards for Critical Infrastructure Protection, Order No. 706, 122 FERC ¶ 61,040 (2008), *order on reh’g*, Order No. 706-A, 123 FERC ¶ 61,174 (2008), *order on clarification*, Order No. 706-B, 126 FERC ¶ 61,229 (2009), *order on clarification*, Order No. 706-C, 127 FERC ¶ 61,273 (2009).

20. *Id.*; *see, e.g., Order No. 706-B*, 126 FERC ¶ 61,229 (clarifying the scope of the CIP Reliability Standards to assure that no “gap” occurs in the applicability of the standards; facilities within a nuclear generation plant in the United States that are not regulated by the U.S. Nuclear Regulatory Commission are subject to compliance with the eight mandatory CIP Reliability Standards approved in Commission Order No. 706).

21. Version 5 Critical Infrastructure Protection Reliability Standards, Order No. 791, 145 FERC ¶ 61,160 (2013).

intent on attacking the United States through vulnerabilities in the electric grid.²² Staff explained that the NERC standards development process is too slow, too open, and too unpredictable to ensure responsiveness in cases where national security is endangered and circumstances require urgent action.²³

It is also worth noting here what FERC's jurisdiction actually is when it comes to protecting grid reliability and keeping the lights on. Section 201 provides the basis for FERC's jurisdiction over the electric utility industry and specifically provides that FERC does not have jurisdiction over facilities for the generation of electricity, facilities used solely for intrastate transmission, or facilities for the local distribution of electricity.²⁴ The most recently approved version of NERC's definition of "Bulk Electric System" contains a "bright line" where equipment operating below a minimum voltage is excluded (with limited exceptions) from FERC oversight.²⁵ Thus, FERC is limited in its authority to mitigate cyber security or other national security threats to reliability that involve facilities found in major population areas like New York City that rely primarily on these lower voltage distribution facilities—facilities that fall under the jurisdiction of the state public utility commissions.²⁶

It is also important to note that much of the smart grid equipment being installed on distribution facilities does not fall under FERC's jurisdiction. These jurisdictional dividing lines between FERC and the states (that oversee local distribution facilities) necessitate a continuous dialogue to share information and raise awareness about threats and vulnerabilities to the electric grid at both the transmission and distribution level.

22. *Cyber Security, Hearing Before the S. Comm. on Energy & Natural Res.*, 112th Cong. 40 (2012) (testimony of Joseph McClelland, Director, Office of Electric Reliability, FERC) available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg67362/pdf/CHRG-112shrg67362.pdf>.

23. *Id.*; see also Letter from Jon Wellinghoff, Chairman, FERC, to Daniel Inouye, Chairman, S. Comm. On Appropriations, and Thad Cochran, Ranking Member, S. Comm. On Appropriations (Feb. 14, 2012), available at <http://www.ferc.gov/industries/electric/indus-act/smart-grid/inouye-cochran.pdf> (addressing the U.S. Government Accountability Office report, ELECTRICITY GRID MODERNIZATION: PROGRESS BEING MADE ON CYBERSECURITY GUIDELINES, BUT KEY CHALLENGES REMAIN TO BE ADDRESSED (GAO-11-117) (2011), available at <http://www.gao.gov/new.items/d11117.pdf>).

24. 16 U.S.C. § 824 (2012).

25. See *Version 5*, 145 FERC ¶ 61,160.

26. See 16 U.S.C. § 824.

III. MARKET MANIPULATION

Now, let us move on to the second promised area of discussion: market manipulation.

Market manipulation matters become high profile because they bring back vivid images of Enron and corporate greed and malfeasance. They can take on a life as not only a civil proceeding, but a criminal one as well.²⁷ At the outset, let me just stress that I take this issue of market manipulation enforcement very seriously. My first few months as a state regulator were spent watching the 2000–2001 Western Energy Crisis. Like so many others, I subsequently read a good deal about the lead-up to this debacle. These events had a big impact on me. While I never really thought I would wind up at FERC, I can tell you that more than once I thought while reading those accounts that “if I ever find myself in the position to help stop the next Enron, I will do something about it.”

Thus, I take the role of market oversight very seriously. Without constant and effective oversight of the markets within our jurisdiction we run the risk of permitting bad actors, be they individuals or companies, to harm our markets and ultimately innocent stakeholders, consumers, and other market participants. A few bad actors can also stymie investment in a sector that needs and deserves investment.

I am sure many of you follow the trade press, as do I. And I would imagine you have seen that the efforts of FERC’s Office of Enforcement have captured the attention of the media, particularly when it comes to investigating market manipulation or fraud. The concern we as regulators face in an era of LIBOR, Madoff, and Countrywide, is that some regulated entities still may not believe that the benefits of compliance outweigh the costs. This is troubling.

When I speak to industry, my advice to compliance officers, in-house counsel, or similarly situated individuals in management positions is as follows: if you were asked by your employees or your Board of Directors whether a particular transaction or practice is proper and legal, ask yourself whether you would feel comfortable if all the details of that business practice or transaction were printed in *The Wall Street Journal*.

The former SEC Chairman, William Cary, has argued that companies and their counsel should not only accept that public opinion influences regulation, but that they should anticipate what type of conduct would

27. See Dan Fitzpatrick & Devlin Barrett, *U.S. Probes Whether J.P. Morgan Employees Misled Regulators: Investigation Centers on Previous Investigation of Alleged Energy-Market Manipulation*, WALL ST. J. (Sept. 4, 2013), <http://online.wsj.com/news/articles/SB1000142412788732412300457905521060300073>.

result in public outcry that could lead to backlash.²⁸ Many practices safely pursued in private lose their justification in public.

IV. RULES VERSUS PRINCIPLES

This is perhaps a good segue into something with which many regulators struggle: the notion of rules versus principles.²⁹ Rules generally have clearly defined meanings and are meant to be easily applied to specific situations, and thus make rules-enforcement less controversial. Principles, on the other hand, are applied more broadly and require substantial investment in investigation and litigation to enforce.

By administering principles-based enforcement, FERC is able to protect the energy markets from all types of fraudulent behavior. A finding of fraud requires either a judgment as to whether a misrepresentation was made or a certain practice occurred with fraudulent intent or direct evidence of that fraudulent intent.³⁰ For this reason, a regulator like FERC cannot possibly create an all-inclusive list of prohibited activities.³¹ There simply is no exhaustive or comprehensive rulebook of all possible scenarios that would result in violations of our anti-manipulation rule—so market participants, shareholders, and regulators must rely on the *use of judgment*. Industry may demand clear instructions via proscriptive rules, but industry still must make judgment calls. And this is where knowledge

28. William L. Cary, *Corporate Standards and Legal Rules*, 50 CAL. L. REV. 408 (1962).

29. See James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115 (2012); William W. Bratton, *Enron, Sarbanes-Oxley and Accounting: Rules versus Principles versus Rents*, 48 VILL. L. REV. 1023 (2003).

30. See Barclays Bank PLC, 144 FERC ¶ 61,041, at PP 52–54 (2013) (order assessing civil penalties) (citations omitted) (noting otherwise legal conduct may be proscribed by our anti-manipulation provisions and “transactions entered into with manipulative intent can serve as the basis for a manipulation claim, even in the absence of some other deceptive conduct”). Cf. *In the Matter of The Royal Bank of Scotland PLC & RBS Secs. Japan Ltd.*, CFTC No. 13–14, Comm. Fut. L. Rep. (CCH) ¶ 32,538, 2013 WL 485759 (C.F.T.C. Feb. 6, 2013) (order imposing sanctions) (citations omitted) (finding “intent is the essence of manipulation” and “the manipulator’s intent separates ‘lawful business conduct from unlawful manipulative activity’”).

31. See Order Revising Market-Based Rate Tariffs & Authorizations, 114 FERC ¶ 61,165, at P 24 (2006) (“The absence of a list of specific prohibited activities does not lessen the reach of the new anti-manipulation rule, nor are we foreclosing the possibility that we may need to amplify section 1c.2 as we gain experience with the new rule, just as the SEC has done.”). See also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 475 (1996) (“The concept of fraud is incompletely specified by design. It was devised by equity courts as a catchall for any species of grossly immoral and deceptive conduct that evaded recognized common law norms.”).

and forethought of how the actions will be received by public opinion can be most instructive.

In March 2012, Andrew Fastow, the former Enron chief financial officer who went to prison for securities fraud spoke to business school students at the University of Colorado-Boulder.³² Fastow acknowledged that he “used the rules to subvert the rules.”³³

The key problem, Fastow told the students, was that when rules are complex it creates “a business opportunity.”³⁴ Fastow acknowledged that “[t]here are people who look at the rules and find ways to structure around them. The more complex the rules, the more opportunity.”³⁵ Fastow explained that was what Enron was doing, with the approval of the board of directors, attorneys, and accountants. Fastow said, “[t]he question I should have asked is not what is the rule, but what is the principle?”³⁶

Ultimately, the proper regulatory objective of principles-enforcement allows for variations in the facts of the cases, while giving enough notice to industry such that the law-to-fact applications are clear enough to provide guidance on FERC’s interpretation of its regulations and standards. This is a two-way street. The regulator must provide clear guidance as to the nature of prohibited conduct. The industry must apply the principles to specific instances so that, as Fastow said, “the rules aren’t used to break the rules.”

Of course there are a select few in industry who continue to advocate the position that “gaming—but not breaking—the rules” is ok.³⁷ It is not.³⁸

32. See Mark Jaffe, *Andrew Fastow Draws on Enron Failure in Speech on Ethics at CU*, DENVER POST (Mar. 20, 2012), http://www.denverpost.com/business/ci_20210676.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See William Pentland, *Federal Energy Regulator Burns the Barn to Roast the Pig; Steep Penalty on Distributed Power Provider May Have Unintended Consequences*, FORBES (Dec. 2, 2013), <http://www.forbes.com/sites/williampentland/2013/11/29/federal-energy-regulator-burns-the-barn-to-roast-the-pig-steep-penalty-on-distributed-power-provider-may-have-unintended-consequences/>.

38. See Midcontinent Indep. Sys. Operator, Inc., 145 FERC ¶ 61,259, at P 2 n.3 (2013) (“[W]e use the phrase “potential gaming” to describe a market participant engaging in potential manipulation in the MISO market.”); *In re Make-Whole Payments & Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 5 (2013) (order approving stipulation & consent agreement) (“In the Energy Policy Act of 2005, Congress directed the Commission to use its new anti-manipulation authority to combat gaming of energy markets.”); Order Denying Rehearing (AEP), 106 FERC ¶ 61,020, at PP 46–47 (2004) (noting the definition of “gaming” describes misconduct that causes reductions in efficiency and/or harm to customers and which takes unfair advantage of market rules and conditions, or any

One need only look to the Congressional Record of EPAct 2005 to see that Congress insisted that the language in the Act “make it *illegal* for any company to use or apply any manipulative or deceptive device to *circumvent* the Federal Energy Regulatory Commission *rules and regulations*.”³⁹ And using the authority granted to it by Congress, the Commission has been clear in its orders that an entity can still engage in market manipulation without violating a specific rule.⁴⁰

In so interpreting the laws we enforce, FERC is guided not only by years of precedent, much of it related to securities law,⁴¹ but also by the federal district courts which have acknowledged that “[t]he methods and techniques of manipulation are limited only by the ingenuity of man.”⁴²

While some would demand that a regulatory agency have the prescience to include in a rate schedule *all* specific misconduct in which a particular market participant could conceivably engage, that standard is unrealistic. It would render regulatory agencies impotent to address newly conceived misconduct and allow them only to pursue last year’s misconduct—essentially, to continually fight the *last* fraud and deny the capability to fight the present or next one.⁴³

In the context of fraud, specific regulations cannot begin to cover all of the infinite variety of cases to which they may apply, and by requiring

behavior capable of rendering the energy markets vulnerable to price manipulation to the detriment of their efficiency).

39. 149 CONG. REC. S10,177 (daily ed. July 30, 2003) (statement of Sen. Cantwell) (emphasis added).

40. See *Make-Whole Payments*, 144 FERC ¶ 61,068, at P 83 (footnote omitted) (“as Order No. 670 emphasizes, fraud is a question of fact to be determined by all the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations”); *Connecticut v. ISO New England Inc.*, 138 FERC ¶ 61,013, at P 11 (2012) (“evidence of a Tariff violation is not dispositive of whether Respondents engaged in market manipulation”).

41. See Federal Power Act, 16 U.S.C. § 824v (2012):

It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in [Securities Exchange Act, section 10-b]), in contravention of such rules and regulations as the Commission may prescribe.

42. *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971); see also *Order Denying Rehearing (AEP)*, 106 FERC ¶ 61,020, at P 48 (“The mere fact that [a tariff] does not expressly prohibit in so many words specific trading strategies such as “Fat Boy” simply means that the Commission did not (as, indeed, it could not) foresee all the myriad means that certain market participants could employ to the detriment of competition; it does not mean that market participants determined to have engaged in Gaming Practices and Partnership Gaming may escape disgorgement of the unjust profits that they gained by their conduct.”).

43. See *Order Denying Rehearing (AEP)*, 106 FERC ¶ 61,020, at P 45.

regulations to be too specific the regulators and courts would be opening up large loopholes allowing conduct that should be regulated to escape regulation.⁴⁴

Because there is no single method by which fraud is best detected, manipulation or fraud enforcement is intensely fact specific.⁴⁵ And the absence of a list of specific prohibited activities does not lessen the reach of FERC's anti-manipulation rule, nor does it mean that FERC enforcers are making up the rules as they go along.⁴⁶

V. FRAUD IS NOT A NEW CONCEPT

Statements suggesting that FERC's interpretation of the anti-manipulation rule is threatening to the markets ignore the very role we are tasked with performing—that is, to ensure that rates are just and reasonable and that market prices reflect supply and demand.⁴⁷

FERC is currently pursuing several market manipulation claims in federal district courts.⁴⁸ While regulatory agencies tend to prefer settlements because the cost of litigation may ultimately hurt ratepayers by delaying refunds of illicitly earned monies, these cases do create the opportunity to have a court review our enforcement decisions based on the anti-manipulation regulations.

One would be hard-pressed to find a member of Congress, industry, or the general public who does not believe that certain Enron employees—from the traders to the high-level executives—engaged in misconduct that included manipulative schemes and misrepresentations about the company's financials and many of its trading activities in the wholesale electric markets. With this in mind, it is perhaps illustrative to compare the

44. See Amendments to Blanket Sales Certificate, Order No. 644, 105 FERC ¶ 61,217, at P 33 (2003).

45. See Order Revising Market-Based Rate Tariffs & Authorizations, 114 FERC ¶ 61,165, at P 24 (2006) (“Furthermore, we recognize that fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive.”).

46. See John A. Bewick, *Bill Hogan, Unbundled*, 150 PUB. UTIL. FORT. 10 (2012), available at <http://mag.fortnightly.com/publication/index.php?i=135782&m=&l=&p=12&pre=&ver=swf>; compare Jeffrey M. Jakubiak, *Don't Fear the FERC: Four steps to minimizing energy trading enforcement risk*, FORT., <http://spark.fortnightly.com/fortnightly/dont-fear-ferc> (last visited Feb. 19, 2014) (“The regulator's job includes looking at actions skeptically.”).

47. 16 U.S.C. § 824e (2012).

48. See, e.g., FERC v. Barclays Bank PLC, No. 2:13-cv-02093 (E.D. Cal. Oct. 9, 2013); FERC v. Lincoln Paper & Tissue, LLC, No. 1:13-cv-13056 (D. Mass. Dec. 2, 2013); FERC v. Silkman, No. 1:13-cv-13054 (D. Mass. Dec. 2, 2013).

Enron schemes with those described in a recent FERC order approving a settlement with Deutsche Bank over allegations of market manipulation.⁴⁹

The Enron traders designed schemes to obtain increased revenue for Enron from wholesale electricity customers and other market participants in the State of California. Under these schemes, the traders knowingly and intentionally filed energy schedules and bids that misrepresented the amount and geographic location of the load they intended to serve.⁵⁰ They did so for the purposes of increasing the appearance of congestion on transmission lines, increasing the market price for congestion fees for transmission between zones, earning congestion payments that otherwise would not have been available, and increasing the value of Enron's Financial Transmission Rights which only generated revenue when congestion existed.⁵¹

FERC's Office of Enforcement saw this same fact pattern with Deutsche Bank, which falsely designated that it was transferring physical power when it was not.⁵² And yet, before a settlement was reached, Deutsche Bank argued to FERC and the court of public opinion that, "[t]he legal position (FERC) Enforcement has taken here is radical."⁵³

Like Enron, Deutsche Bank scheduled energy that it did not have or did not intend to supply.⁵⁴ In its investigation, Enforcement determined that Deutsche Bank's physical trades were not consistent with the fundamentals underlying market prices and did not reflect supply and demand, but rather these trades were undertaken with the intent to change electricity prices to benefit the bank through its Congestion Revenue Rights.⁵⁵ These rights are similar to the Financial Transmission Rights employed by the Enron traders.

49. Deutsche Bank Energy Trading, LLC, 142 FERC ¶ 61,056 (2013) (order approving stipulation & consent agreement).

50. See *United States v. Belden*, No. CR 02-0313-MJJ (N.D. Cal. Oct. 17, 2002) (Plea agreement), *United States v. Richter*, No. CR 03-0026-MJJ (N.D. Cal. Feb. 4, 2003) (Plea agreement) (Defendants, who traded electricity from Enron's office in Portland, Oregon, pleaded guilty to fraudulent *manipulation* of the California electricity market.).

51. See *id.*

52. *Deutsche Bank*, 142 FERC ¶ 61,056.

53. Deutsche Bank Energy Trading, LLC, Answer to Order to Show Cause, Docket No. IN12-4-000 at 1 (filed Nov. 5, 2012); see also Christopher McEachran, *FERC's Recent Approach to Market Manipulation*, WINDPOWER ENG'G & DEV. (Nov. 26, 2013), <http://www.windpowerengineering.com/policy/fercs-recent-approach-market-manipulation/> ("FERC has brought actions against producers and traders alike, utilizing newly minted theories of market manipulation.").

54. See *Deutsche Bank*, 142 FERC ¶ 61,056.

55. *Id.*

While the schemes devised and implemented by the Deutsche Bank traders are not *exactly* the same as the schemes described by the Enron traders, there are stark similarities and the principle of market manipulation is the same. Enforcement scrutiny in this light is far from radical or novel. It is the logical application of consistent regulatory principles.

VI. THE CORPORATE CULTURE

This brings me to my final point regarding FERC's interpretation of its regulations and standards, and that is compliance and the proper corporate culture. FERC staff has reviewed countless company compliance training materials and documents, many prepared by very competent outside counsel. One thing has become apparent during the review of these documents: most of these compliance documents get it exactly right. This begs the question on those occasions when a company's conduct violates its own compliance guidance: were these compliance documents merely window-dressing?

Requiring employees to attend an annual compliance workshop has a limited impact if those lessons are set aside until the next mandatory training day. Having an active, well-trained, internal audit department and a corporate culture that encourages the reporting of improprieties is essential. I believe corporate culture is a critical element of prevention.

One of the better site visits I have had in my time on the Commission was to an energy trading floor in which the company described to me its recently beefed-up compliance program. A company official said he wanted compliance officers who had trading expertise and who were not wallflowers. In short, he wanted people who are not shy about asking traders how and why deals were consummated and individuals who are knowledgeable enough to know when the wool is being pulled over their eyes.

Transparency is another powerful tool for regulated entities. When companies self-report to FERC's Office of Enforcement, staff will ask how the violation occurred, who was responsible, who was harmed, and most important, what has the company done to mitigate the violation or to take steps to ensure it will not reoccur.

Every year FERC's Office of Enforcement issues an Annual Report. These reports provide examples of self-reports and investigations that are closed with no action despite a finding of a violation.⁵⁶ The way a

56. Enforcement's most recent annual report is available at <http://www.ferc.gov/legal/staff-reports/2013/11-21-13-enforcement.pdf>.

company responds after discovering a violation speaks volumes.⁵⁷ We tell companies not to wait until they are caught, no matter how insignificant they think the violation may be. They should be prepared to show that compliance is a meaningful component of their organization's daily operations.

VII. CONCLUSION

In closing, it is fair to ask, ten years after the Northeast Blackout and thirteen years after the Western Energy Crisis, "how are we doing?" When it comes to reliability, it is a "Tale of Two Cities."

On those matters that were the direct cause of the great Northeast Blackout, we are unquestionably better off than we were before. Standardized reliability practices, required training, vegetation management standards, and the technological advancement of grid monitoring all make it much less likely that we will have a similar event. This is not to say such a blackout still could not happen; even recent history with smaller blackouts has taught us that any complex machine that can be subject to human error is subject to breakdowns. But we are in a much better position than we were before EPLA 2005.

Yet when it comes to emerging threats like cyber attacks, we are actually in a more precarious position. This is simply the nature of evolving threats and enemies that are more determined and technologically advanced than they have ever been. We will need increased effort, coordination, and results from multiple actors, including the executive branch, Congress, and private industry, especially as these efforts relate to information sharing and responses to fast moving threats.

When it comes to the issue of market manipulation, I believe we are in a much better spot than we were even a few years ago. It takes several years for any government agency to fully ramp up an undertaking such as the one FERC was given post-2005. Today, FERC's Office of Enforcement sits at approximately 200 employees, forty of whom are tasked to the Division of Analytics and Surveillance. Today we have more eyes on the market and more boots on the ground than ever before. This gives FERC insights into what is happening and allows it to follow-up when something seems amiss. I do not believe that the recent high-profile

57. Cf. John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57 (2005) (internal citations omitted) ("Enron caught the misconduct, but amazingly, Enron's management initially declined to fire the traders, apparently because the trading operation was so profitable. Indeed, one senior executive sent the rogue oil traders an e-mail ending: '[p]lease keep making us millions.'").

enforcement cases indicate a trend towards greater manipulation in the marketplace than before, but rather I believe that they are an indication FERC is catching manipulation when it does occur, and that FERC is catching it earlier, which decreases the harm to the consumers we are there to protect.

All and all, this is not a bad track record for a law only about eight years old. Is there still more work to do? Sure. The nature of a complex network that includes the nation's wholesale power and gas markets ensures this will be an ongoing process to address new threats in a dangerous world. We must continue to ensure that the spirit that allowed us to collectively address the challenges of the early 2000s still exists today.