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## FERC Does Not Have Anti-Manipulation Authority in Financial Markets

Antony E. Ghee\*

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# FERC Does Not Have Anti-Manipulation Authority in Financial Markets

Antony E. Ghee

## Abstract

Does the Federal Energy Regulatory Commission (“FERC”) have authority to police manipulation in financial markets if that conduct has an effect on physical markets? FERC has erroneously argued that it possesses such authority. Adopting FERC’s view would confound the regulatory landscape and promote duplicative and even conflicting regulation. FERC’s mission is clear: to ensure that the rates charged for wholesale sales of natural gas and electricity are “just and reasonable.” Its jurisdiction is limited by statute and nothing in the legislative history, prevailing case law, or public policy suggests that Congress conferred to FERC powers to police manipulation outside of its statutorily defined jurisdictional boundaries. Accordingly, FERC does not, and should not, have authority to police manipulation in financial markets even if that conduct has an effect on physical markets.

**KEYWORDS:** Energy, FERC, Federal, Finance, Markets, Regulation

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## ABSTRACT

Does the Federal Energy Regulatory Commission (“FERC”) have authority to police manipulation in financial markets if that conduct has an effect on physical markets?

FERC has erroneously argued that it possesses such authority. Adopting FERC’s view would confound the regulatory landscape and promote duplicative and even conflicting regulation. FERC’s mission is clear: to ensure that the rates charged for wholesale sales of natural gas and electricity are “just and reasonable.” Its jurisdiction is limited by statute and nothing in the legislative history, prevailing case law, or public policy suggests that Congress conferred to FERC powers to police manipulation outside of its statutorily defined jurisdictional boundaries. Accordingly, FERC does not, and should not, have authority to police manipulation in financial markets even if that conduct has an effect on physical markets.

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## INTRODUCTION

Does the Federal Energy Regulatory Commission (“FERC”) have authority to police manipulation in financial markets if that conduct has an effect on physical markets? The answer depends on (i) whether FERC’s jurisdiction to police manipulation extends beyond the jurisdictional boundaries established by the Natural Gas Act of 1938 (“NGA”) (and its corresponding provision in its sister act, the Federal Power Act of 1935 (“FPA”)) and, if so, (ii) whether that jurisdiction extends so far as to encroach upon the jurisdiction of financial markets (such as futures and securities) regulated by other federal agencies such as the Commodity Futures Trading Commission (“CFTC”) and

Securities Exchange Commission (“SEC”). FERC has erroneously argued that it possesses such authority.<sup>1</sup>

FERC does not possess the powers of financial regulators. To conclude otherwise would confound the regulatory landscape and promote duplicative and even conflicting regulation. FERC’s mission is clear: to ensure that the rates charged for wholesale sales of natural gas and electricity are “just and reasonable.”<sup>2</sup> Its jurisdiction is limited by statute and nothing in the legislative history, prevailing case law, or public policy suggests that Congress conferred to FERC powers to police manipulation outside of its statutorily defined jurisdictional boundaries. Accordingly, FERC does not, and should not, have authority to police manipulation in financial markets even if that conduct has an effect on physical markets.

**I. FERC’S JURISDICTION IS LIMITED TO, AND DOES NOT EXTEND BEYOND, THAT WHICH IS PROVIDED IN NGA §1(b) (AND ITS COROLLARY IN THE FPA)**

**A. FERC DOES NOT HAVE AUTHORITY TO POLICE MANIPULATION IN FINANCIAL MARKETS BASED ON ITS HISTORICAL JURISDICTION AND MANDATE**

Since its inception, FERC and its predecessor entities have had limited jurisdiction and a clearly defined mandate.<sup>3</sup> Congress established FERC’s predecessor organization, the Federal Power Commission, in 1920 to coordinate hydroelectric projects under federal control.<sup>4</sup> Congress subsequently expanded FERC’s jurisdiction with the passage of the FPA and the NGA to close the “Attleboro Gap”<sup>5</sup> and regulate the sale and transportation of wholesale electricity and natural gas in interstate commerce, as well as to ensure that prices are “just and reasonable and not unduly discriminatory.”<sup>6</sup> Since enactment, the NGA

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1. *See generally* Amaranth Advisors L.L.C., 121 FERC ¶ 61,224 (2007) [hereinafter Order Denying Rehearing] (order denying rehearing).

2. *See* 16 U.S.C. § 824d (2006); *see also* *FERC Strategic Plan – FERC’s Mission*, FERC, <http://www.ferc.gov/about/strat-docs/strat-plan.asp> (last updated Feb. 13, 2012).

3. *See History of FERC*, FERC, <http://www.ferc.gov/students/ferc/history.asp> (last visited Nov. 13, 2012).

4. *Id.*

5. *See* Pub. Util. Comm’n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89 (1927) (holding that the Commerce Clause prohibits state regulation that directly burdens interstate commerce).

6. *History of FERC*, *supra* note 3.

and FPA have been amended several times in response to regulatory concerns and energy crises.<sup>7</sup> Most recently, the Energy Policy Act of 2005 (“EPAAct”) amended the NGA and FPA to address regulatory deficiencies that were exposed in the California energy crisis.<sup>8</sup> Over time, as a result of its many amendments, FERC evolved from a rate-setting agency into an agency with enforcement powers.<sup>9</sup>

Before Congress enacted EPAAct, FERC relied on its market behavior rules to police price manipulation in wholesale electric and natural gas transactions.<sup>10</sup> The market behavior rules prohibited “[a]ctions or transactions that [were] without a legitimate business purpose and that [were] intended to or foreseeably could manipulate market prices, market conditions, or market rules.”<sup>11</sup> The specific types of transactions targeted by the anti-manipulation authority included, but were not limited to, wash trades, transactions based on false information, artificial congestion, and collusion.<sup>12</sup>

The breadth and scope of FERC’s jurisdiction and its anti-manipulation authority were expressly limited by NGA § 1(b) to (i) the transportation of natural gas in interstate commerce, (ii) the sale in interstate commerce of natural gas for resale, and (iii) natural gas companies in such transportation or sale.<sup>13</sup> FERC’s jurisdiction did not reach intrastate sales, retail sales, local distribution of natural gas or facilities used for its distribution, or the production or gathering of natural gas.<sup>14</sup> These explicitly-stated exclusions are notable because “Congress . . . not only prescribed the intended reach of [FERC’s] power, but also specified the areas into which [FERC’s] power was not

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7. *Id.*

8. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in scattered sections of the U.S. Code). *See also* JERRY MARKHAM, 13 COMMODITIES REGULATION: FRAUD MANIPULATION & OTHER CLAIMS § 16:10.60 (2011).

9. *See* Paul J. Pantano, Jr. & Danielle K. Schonback, *Is the FERC’s Anti-Manipulation Jurisdiction Boundless?* FUTURES & DERIVATIVES L. REP., Oct. 2007, at 1.

10. *See id.*

11. *Id.* at n.1.

12. *Id.*

13. *See generally* William Demarest, “Traditional” NGA Jurisdictional Limits Constrain FERC’s Market Manipulation Authority, 31 ENERGY L.J. 471 (2010).

14. *Id.* at 481.

to extend.”<sup>15</sup> In short, the NGA’s jurisdiction was limited in scope and FERC’s purpose clearly defined.

Courts interpreting the scope of FERC’s authority have consistently held that FERC’s jurisdiction is constrained by the “limits Congress placed upon that power under § 1(b).”<sup>16</sup> Thus, FERC’s exercise of its statutory powers is inextricably linked to whether the activities or persons in question fall within FERC’s regulatory jurisdiction under the NGA or FPA, as the case may be. On that basis, case law dictates that FERC’s jurisdiction extends generally to natural gas companies and electric utilities.<sup>17</sup> Without an express Congressional authorization, there is no basis upon which FERC’s historical jurisdiction and statutory mandate may be expanded to financial markets or any other markets that were not contemplated by Congress.<sup>18</sup>

#### B. THE ENERGY POLICY ACT OF 2005 DID NOT EMPOWER FERC TO POLICE MANIPULATION IN FINANCIAL MARKETS.

EPAAct was enacted in response to California’s energy crisis in 2001 and 2002, during which wholesale energy prices were significantly inflated above historical levels and energy supplies were significantly disrupted.<sup>19</sup> Inflated prices and energy disruptions were attributable to a number of factors including manipulative practices of energy traders, most notably Enron, which allegedly engaged in gaming practices to exploit regulatory and other dysfunctions in California’s rate structure.<sup>20</sup> Although Enron engaged in complex (and even questionable) trading strategies, it is not disputed that many of the transactions it executed involved the purchase and sale of energy in physical markets for which there was a delivery requirement.<sup>21</sup> Therefore these transactions, no matter how complex or questionable, could theoretically fall within FERC’s jurisdiction if consummated in interstate commerce. However, it remains debatable—even today—whether Enron engaged “in

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15. *See* Fed. Power Comm’n v. Panhandle E. Pipe Line Co., 337 U.S. 498, 503 (1949).

16. *See* Demarest, *supra* note 13, at 480.

17. *Id.*

18. *Id.* at 475.

19. *See* THOMAS HAZEN & JERRY MARKHAM, 23A BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAW § 9:17.70 (2011) (discussing the California energy crisis and the techniques employed by Enron and other energy traders).

20. *See id.*

21. *Id.*



legitimate arbitrages designed to take advantage of imperfections in the California regulatory structure or whether its activity constituted illegal price manipulation and fraud”<sup>22</sup> based upon FERC’s Market Behavior Rules.

Given the fallout from the energy crisis and lingering questions about the legality of Enron’s activities, Congress sought broader prohibitions against the manipulation of energy and natural gas markets.<sup>23</sup> It is not disputed that Enron purchased and resold energy in interstate commerce employing strategies that resulted in inflated prices.<sup>24</sup> However, FERC had to consider Enron’s alleged misconduct in the context of the Market Behavior Rules.<sup>25</sup> Presumably then, Congress acknowledged the regulatory deficiency and intended to grant FERC broader powers to police manipulation beyond the limited scope of the Market Behavior Rules, upon which FERC had traditionally relied. Considering the grant of power in this context, it is likely that Congress recognized that certain purchases and sales of energy that are within FERC’s jurisdiction would arguably not have fallen within the ambit of the Market Behavior Rules. However, there is nothing in the legislative history or the resulting amendments to the NGA or FPA to suggest that the expanded powers were intended to reach beyond FERC’s jurisdictional boundaries, which is clearly defined in NGA § 1(b).

### *1. NGA §4A Amendments*

EPAAct §315 added a new §4A to the NGA.<sup>26</sup> The provision, in relevant part, provided that:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) in contravention of such rules and regulations as the Commission may prescribe as

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22. *Id.*

23. *See* 16 U.S.C. § 824v (2006); 15 U.S.C. § 717c-1 (2006).

24. *See* HAZEN & MARKHAM, *supra* note 19.

25. *See* Pantano & Schonback, *supra* note 9, at 1.

26. Energy Policy Act of 2005, sec. 315, § 4A, 119 Stat. 594, 691 (codified as amended at 15 U.S.C. § 717c-1 (2006)).

necessary in the public interest or for the protection of natural gas ratepayers.”<sup>27</sup>

When adopting EAct § 315, Congress instructed that certain key terms should be interpreted as they had been under § 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), and particularly Rule 10b-5, the SEC’s anti-manipulation and anti-deception rule.<sup>28</sup> As a result, when FERC wrote its own rules to implement NGA § 4A, it took an expansive, but flawed view that it was now empowered to pursue “manipulative and deceptive conduct by ‘any entity,’—directly or indirectly—in connection with [any] jurisdictional transaction . . . .”<sup>29</sup>

Under its own interpretation of its newly granted powers, FERC took the position that if conduct “affect[s] a *regulated* transaction in natural gas or electric energy (including transportation or transmission), the rules reach such conduct by ‘any entity’ . . . *whether or not* that entity itself is regulated by the FERC in other respects.”<sup>30</sup> Under this expansive view, FERC claims that it has jurisdiction to police financial markets if an entity’s intentional or reckless conduct occurs outside of its jurisdiction but has an impact on prices within its jurisdiction.<sup>31</sup> FERC misinterprets Rule 10b-5 and reaches an erroneous conclusion about the reach of its powers granted under NGA § 4A.

a. NGA § 4A’s Reference to “Any Entity” Only Refers to Those Entities Specifically Contemplated as Being Within FERC’s Jurisdiction

FERC argues that its interpretation of “any entity” as used in NGA § 4A reflects “Congress’ intent not to limit [FERC’s anti-manipulation powers] to traditionally NGA-jurisdictional entities.”<sup>32</sup> FERC, however, offers no legislative support for its conclusion and simply reasons that if Congress had intended to limit the scope of FERC’s authority under NGA § 4A, it would have specifically identified the entities (e.g., “natural gas companies”) that were to be subject to FERC’s anti-

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27. *Id.*

28. *See* Order Denying Rehearing, *supra* note 1, at 62,069–70.

29. *See* FERC Prohibition of Natural Gas Market Manipulation, 18 C.F.R. § 1c.1 (2012); *see also* Allan Horwich, *Warnings to the Unwary: Multi-Jurisdictional Federal Enforcement of Manipulation and Deception in the Energy Markets After the Energy Policy Act of 2005*, 27 ENERGY L.J. 363, 385 (2006).

30. Horwich, *supra* note 29, at 385.

31. *Id.* at 386–87.

32. Demarest, *supra* note 13, at 488.

manipulation jurisdiction rather than using the phrase “any entity.”<sup>33</sup> Since Congress did not specifically enumerate or define those entities, then, according to FERC, its anti-manipulation authority applies to any and all entities.

FERC’s interpretation of Congress’ silence is misplaced. If Congress had used a defined term, it may have resulted in a class of covered entities smaller than the universe of NGA-jurisdictional entities that were contemplated in the NGA’s jurisdictional provision, § 1(b). Furthermore, a narrowly defined term might fail to capture certain existing businesses in the transportation and sales chain or new business not yet envisioned that, once created, would otherwise have fallen within the class of covered entities.

Before the enactment of EAct, NGA § 1(b) provided that FERC’s powers applied, for example, to natural gas transportation companies, sellers, and resellers in interstate commerce.<sup>34</sup> However, EAct amended NGA § 1(b) to also cover persons engaged in “the importation or exportation of natural gas in foreign commerce.”<sup>35</sup> Had Congress not used more expansive language, these newly covered “persons” and possibly some of the entities that are explicitly listed in FERC’s jurisdictional provision, would not have been subject to the new anti-manipulation powers.<sup>36</sup> Thus, Congress likely intended to expand the scope of the entities subject to FERC’s anti-manipulation authority, but only to the extent of those jurisdictional entities contemplated prior to the enactment of EAct, as well as those entities engaged in the importation and exportation of natural gas in foreign commerce. The legislative history of EAct does not suggest that Congress intended more.<sup>37</sup> Therefore, attempts by FERC to regulate “any entity,” including those operating in financial markets, reach well beyond FERC’s congressionally-authorized jurisdictional boundaries.

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33. *Id.*

34. *Id.* at 480.

35. Natural Gas Act § 1, 15 U.S.C. § 717(b) (2006).

36. *See* Demarest, *supra* note 13, at 488–89.

37. *Id.* at 495.

b. FERC's Reliance on the SEC's Rule 10b-5 and its Interpretation of "in Connection with" are Overly Broad

FERC has interpreted "in connection with" to mean that it has broad jurisdiction over entities that engage in conduct affecting its subject matter jurisdiction.<sup>38</sup> In other words, FERC seeks to assert its jurisdiction wherever "there is a 'nexus' between the manipulative conduct and [a FERC] jurisdictional transaction."<sup>39</sup> Thus, based on FERC's interpretation, it would have authority to assert jurisdiction over "conduct [in financial markets] that has only a tenuous, if any, tie to what the FPA and NGA delineate as FERC-jurisdictional transactions."<sup>40</sup>

To reach its conclusion, FERC relied heavily upon the Exchange Act, specifically § 10(b) and Rule 10b-5, as well as their judicial precedents.<sup>41</sup> However, FERC's analysis of § 10(b) and Rule 10b-5, and its determination regarding its applicability to the NGA, is flawed on several grounds: (i) FERC's interpretation of "in connection with" is inconsistent with the use of the phrase in other sections of the NGA; (ii) courts have rejected FERC's view that the "in connection with" standard allows it to assert jurisdiction over parties engaging in conduct outside of its jurisdiction; and (iii) the U.S. Supreme Court has adopted a broad interpretation of the phrase "in connection with" in Rule 10b-5, but has explicitly required that the fraud must be coincident to a sale of securities to prevail on a § 10(b) claim.<sup>42</sup>

First, FERC's interpretation of "in connection with" is not consistent with the use of the phrase in other sections of the NGA.<sup>43</sup> Contrary to FERC's assertion, the phrase "in connection with" does not grant FERC power to police manipulation beyond its jurisdictional boundaries.<sup>44</sup> This view is consistent with the court's conclusion reached in *Conoco Inc. v. FERC*.<sup>45</sup> In *Conoco*, the court considered the

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38. See Order Denying Rehearing, *supra* note 1, at 62,072.

39. Pantano & Schonback, *supra* note 9, at 3.

40. *Id.* at 2.

41. See generally Order Denying Rehearing, *supra* note 1, at 62,074–76.

42. SEC v. Zandford, 535 U.S. 813, 820–22 (2002).

43. See Brief of Petitioner at 52–55, *Hunter v. FERC*, 403 F. App'x 525 (D.C. Cir. 2010) (No. 10-1017), 2010 WL 5779115, at \*37–40 [hereinafter *In re Hunter Petitioner Brief*].

44. *Id.* at 53.

45. 90 F.3d 536 (D.C. Cir. 1996).

phrase “in connection with” that appears elsewhere in the NGA.<sup>46</sup> FERC argued that the language authorized it to “regulate facilities that it has expressly found are not within its [NGA] §1 (b) jurisdiction.”<sup>47</sup> The court rejected FERC’s argument and held that “the ‘in connection with’ language . . . neither expand[s] [FERC’s] jurisdiction, nor override[s] [NGA] §1 (b) . . . .”<sup>48</sup>

Second, courts have rejected FERC’s view that the “in connection with” standard used in § 10(b) allows FERC to assert jurisdiction over parties engaging in conduct outside of its jurisdiction. For example, in *Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp.*,<sup>49</sup> the court rejected arguments that the anti-manipulation provisions of § 10(b) covered purchases and sales of “any” securities even though the statute was “intended to be construed flexibly.”<sup>50</sup> Instead, the court held that the alleged misrepresentation by one company that merely “affected” the price of another company’s securities was insufficient to give the plaintiffs standing to sue under § 10(b) or Rule 10b-5.<sup>51</sup> Employing the § 10(b) or Rule 10b-5 standard in the context of energy markets presumably would yield the same result. In other words, misconduct that occurs in financial markets and incidentally affects prices within energy markets would be well beyond the intended reach of the statute.

Equally compelling are the findings of the court in *Leykin v. AT&T Corp.*,<sup>52</sup> which explained that “[n]ot all conduct that negatively affects a company’s stock price is actionable as a federal securities fraud. The scheme to defraud must coincide with the sale of the securities.”<sup>53</sup> The court further noted that “[c]onduct that is merely incidental or tangentially related to the sale of securities will not meet the ‘in connection with’ requirement.”<sup>54</sup>

Third, the Supreme Court has adopted a broad interpretation of the phrase “in connection with” in Rule 10b-5, but has explicitly required

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46. *Id.* at 552.

47. *In re Hunter* Petitioner Brief, *supra* note 43, at 52–53.

48. *Id.*

49. 369 F.3d 27 (2d Cir. 2004).

50. *Id.* at 32.

51. *Id.* at 34; *see Pantano & Schonback, supra* note 9, at 3.

52. 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006).

53. *Id.* (citing *SEC v. Zandford*, 535 U.S. 813, 822 (2002)).

54. *Id.* (citing *Ling v. Deutsche Bank, AG*, No. 04 Civ. 4566 (HB), 2005 WL 1244689, at \*6 (S.D.N.Y. May 26, 2005)).

that the fraud be coincident to a sale of securities.<sup>55</sup> FERC relies upon *SEC v. Zandford* for the proposition that § 10(b) should be construed in a broad and flexible manner to accomplish the far-reaching and remedial purpose of the statute.<sup>56</sup> FERC, however, fails to point out that the Court asserted that the application of § 10(b) and Rule 10b-5 is not without limit.<sup>57</sup> Critically, the Supreme Court cautioned “that ‘in connection with’ must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b).”<sup>58</sup> In *United States v. O’Hagan*,<sup>59</sup> the Supreme Court stated that the requisite showing is “deception ‘in connection with the purchase or sale of any security,’ not deception of an identifiable purchaser or seller.”<sup>60</sup> Thus, applying § 10(b) to natural gas transactions—rather than to securities—means that FERC’s authority to police manipulation must be coincident to a sale of natural gas.<sup>61</sup> Transactions in financial markets are independent of physical markets and, therefore, are not coincident to sales of natural gas.<sup>62</sup> Accordingly, FERC’s reliance on § 10(b) does not provide a basis for it to gain jurisdiction over financial markets, even if there is an incidental impact on physical markets.<sup>63</sup>

#### C. FERC’S INTERPRETATION AND APPLICATION OF ORDER 670 ARE ULTRA VIRES

Order 670, § 1.c.1 codifies for rulemaking purposes FERC’s prohibition of natural gas market manipulation based on its interpretation of the NGA § 4A amendment.<sup>64</sup> A corollary provision is provided for the purchase and sale of electricity in § 1.c.2 for the FPA § 222 amendment.<sup>65</sup> FERC claims that the language of its own

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55. *SEC v. Zandford*, 535 U.S. 813 (2002); see *Leykin*, 423 F. Supp. 2d at 241.

56. See Order Denying Rehearing, *supra* note 1, at 62,074–75 (citing *Zandford*, 535 U.S. at 819 & *Superintendent of Ins. of the State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 (1971)).

57. *Zandford*, 535 U.S. at 820.

58. *Id.*

59. 521 U.S. 642 (1997).

60. *Id.* at 658.

61. See generally *In re Hunter* Petitioner Brief, *supra* note 43, at \*40.

62. *Id.*

63. *Id.*

64. Prohibition of Energy Market Manipulation, 18 C.F.R. § 1c.2 (2012).

65. See Philip H. Hilder & Scott L. Mullins, *Attack of the Clone: FERC’s Anti-Manipulation Rule Uses SEC Tools*, in AN ABA-CLE PUBLICATION ON WHITE COLLAR CRIME 2008, at K-2 (2008); see also Demarest, *supra* note 13, at 482.

rulemaking expands its jurisdictional reach beyond its statutory boundaries and allows it to reach behavior in financial markets that has an impact on physical markets.<sup>66</sup> However, FERC's argument is not persuasive. If the NGA and FPA are limited in scope, so too are rules adopted by FERC to codify Congress' statutory mandate.<sup>67</sup> "One of the most revered principles of administrative law, after all, is that an agency cannot . . . extend the reach of its jurisdiction beyond that encompassed by statute."<sup>68</sup> Accordingly, without a corresponding amendment to NGA § 1(b) (and the corresponding provision in the FPA) to expand FERC's jurisdiction, FERC's interpretation and application of Order 670 was made in excess of its delegated powers and is therefore *ultra vires*.<sup>69</sup>

**II. EVEN IF FERC'S JURISDICTION EXTENDS BEYOND THE  
BOUNDARIES OF NGA §1(B) (AND ITS COROLLARY IN THE FPA), IT  
DOES NOT EXTEND SO FAR AS TO ENCROACH UPON THE JURISDICTION  
OF FINANCIAL MARKETS REGULATED BY OTHER FEDERAL AGENCIES,  
EVEN IF CONDUCT HAS AN EFFECT ON PHYSICAL MARKETS**

**A. THE CFTC HAS EXCLUSIVE JURISDICTION OVER FUTURES  
TRANSACTIONS**

Prior to 1974, multiple state and federal agencies regulated commodities futures trading.<sup>70</sup> As a result, market participants were often subjected to conflicting regulations and agency rulings.<sup>71</sup> To minimize duplicative oversight and conflicting rulings, Congress enacted the Commodity Futures Trading Commission Act of 1974 (which amended the Commodity Exchange Act of 1936 ("CEA")), to (a) create and centralize the regulation of futures with the CFTC; (b) empower the CFTC with exclusive jurisdiction over futures transactions and futures contracts; and (c) state in plain terms that the CFTC's

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66. See generally *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 (2007) (order to show cause).

67. See *Hilder & Mullins*, *supra* note 65, at K-3.

68. See Sharon Brown-Hruska & Robert Zwirb, *CFTC & FERC vs. Amaranth: Doing the Sister Regulator Act*, FUTURES & DERIVATIVES L. REP., Oct. 2007, at 1.

69. See *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 492-94 (D.C. Cir. 1988); see also *In re Hunter* Petitioner Brief, *supra* note 43, at 35.

70. See 120 CONG. REC. S16, 127-28 (daily ed. Sept. 9, 1974).

71. See *In re Hunter* Petitioner Brief, *supra* note 43, at 25.

jurisdiction over futures transactions and futures contracts markets preempts other state and federal regulatory authorities.<sup>72</sup> Thus, Congress was clear about the breadth and scope of the CFTC's jurisdiction. The plain language of the statutory text, its legislative history, and over thirty-five years of case law leaves little doubt that Congress intended to and did in fact confer upon the CFTC exclusive jurisdiction over futures transactions. Therefore, any claims by FERC that it has any jurisdiction whatsoever over futures transactions is inconsistent with Congress' intent.

*1. The Statutory Text of CEA § 2(a)(1)(A) Is Explicit and Clear*

The Supreme Court has stated that its "analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well."<sup>73</sup> CEA § 2(a)(1)(A) provides, in pertinent part, that the CFTC shall have "exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving" futures contracts "traded or executed" on CFTC-licensed exchanges, called designated contracts.<sup>74</sup> The plain reading of the statute makes it clear that Congress granted to the CFTC exclusive jurisdiction over futures transactions.

FERC has acknowledged the CFTC's exclusive jurisdiction over futures transactions, but seeks to distinguish manipulative futures trading as not falling within that exclusive jurisdiction.<sup>75</sup> FERC's argument is, however, without merit. Industry Associations agree that where "Congress intended to limit the broad grant of [the] CFTC['s] exclusive jurisdiction, it expressly" did so by amending the CEA.<sup>76</sup> For example, Congress explicitly granted to the SEC authority over certain kinds of options<sup>77</sup> and security futures products.<sup>78</sup> Significantly, the

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72. Commodity Futures Trading Commission Act of 1974 § 101(a)(1), 7 U.S.C. § 2(a)(1)(A) (2006).

73. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal citations omitted).

74. Commodity Exchange Act of 1936 § 2(a)(1)(A), 7 U.S.C. § 2(a)(1)(a) (2006).

75. See Corrected Amicus Curiae Brief of Futures Industry Association et al. in Support of Petitioner & Intervenor at 24, *Hunter v. FERC*, 403 F. App'x 525 (D.C. Cir. 2010) (No. 10-1017), 2010 WL 5779118, at \*14 [hereinafter Amicus Curiae Brief of Futures Industry Association].

76. *Id.* at 25.

77. Commodity Exchange Act § 2(a)(1)(C).



express grant of authority to the SEC came only after it settled jurisdictional differences with the CFTC.<sup>79</sup> Before those jurisdictional differences were settled, courts recognized that futures and securities markets were converging, yet repeatedly held that even where the underlying commodity was a security, the CFTC maintained jurisdiction over futures transactions.<sup>80</sup> Even in situations where the SEC disagreed with how the CFTC regulated the futures markets, the courts suggested that any such concerns were not the SEC's business, but rather a matter for Congress.<sup>81</sup> It was only following a series of studies, negotiations, and settlements that Congress eventually confirmed the CFTC's authority over options and security futures products, while granting veto authority to the SEC over new stock index futures contracts approved by the CFTC.<sup>82</sup> "Notably, Congress has never enacted an explicit exemption [or carve-out] from [the CFTC's] exclusive jurisdiction [in favor of] FERC as it did for the SEC . . . ."<sup>83</sup> In accordance with prevailing practices, "[i]n circumstances where Congress has enacted an explicit exemption for one agency, but not other agencies, courts should not read into the statute an exemption for those agencies."<sup>84</sup>

## 2. Legislative History Leaves No Doubt About Congress' Intent

The statutory text granting exclusive jurisdiction to the CFTC is clear and unambiguous, and its exceptions and exclusions are explicitly stated.<sup>85</sup> However, if there remains any doubt about the breadth and scope of the CFTC's jurisdiction, the legislative history is replete with evidence of Congress' intent.<sup>86</sup> Specifically, when the 1974 amendments were enacted, the Conference Committee, Senate Chairman and House Committee Chairman were all in agreement in

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78. Commodity Exchange Act § 2(a)(1)(D); *see id.* § 2(c) (carving out an exemption for non-retail foreign currency transactions through the Treasury Amendment).

79. *See* Jerry Markham, *Merging the SEC & CFTC – A Clash of Cultures*, 78 U. CIN. L. REV. 537, 570 (2009).

80. *See id.*

81. *See id.* at 574 & n.205 (citing *Bd. of Trade v. SEC*, 187 F.3d 713 (7th Cir. 1999)).

82. *Id.* at 569–71.

83. Amicus Curiae Brief of Futures Industry Association, *supra* note 75, at 27.

84. *United States v. Vonn*, 535 U.S. 55, 65 (2002).

85. Commodity Exchange Act § 2(a)(1)(A).

86. H.R. REP. NO. 93-1383 (1974) (Conf. Rep.).

echoing Congress' intent to confer exclusive jurisdiction upon the CFTC.<sup>87</sup>

The Conference Committee articulated that “the [CFTC]’s jurisdiction over futures contract markets . . . is exclusive . . . and the [CFTC]’s jurisdiction, where applicable, supersedes State as well as Federal agencies.”<sup>88</sup> Furthermore, “[u]nder the exclusive grant of jurisdiction to the [CFTC], the authority of the [CEA] . . . would preempt the field insofar as futures regulation is concerned.”<sup>89</sup> The Senate Committee Chairman asserted that by “establishing [the CFTC], it [was] the Committee’s intent to give it exclusive jurisdiction over those areas delineated in the [CEA].”<sup>90</sup> The objective, he explained, was to “assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings.”<sup>91</sup> House Committee Chairman Poage underscored the point, stating that the provision was adopted “in an attempt to avoid unnecessary, overlapping and duplicative regulation.”<sup>92</sup>

Given the plain meaning of the statutory text and the clarity with which the legislative history reflects Congress' intent, it is clear that the CFTC's jurisdiction is exclusive. Accordingly, other federal agencies, such as FERC, may not encroach upon that jurisdiction without express Congressional authorization. Courts agree with this view, having repeatedly recognized and reaffirmed the CFTC's exclusive jurisdiction.<sup>93</sup>

### 3. *Case Law Confirms CFTC's Exclusive Jurisdiction*

Decades of case law strongly support the conclusion that the CFTC's exclusive jurisdiction over futures markets is indisputable. The prevailing view is that “[a]ll U.S. futures trading in all goods and articles (except onions), including sources of energy, like natural gas, is subject

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87. *Id.*

88. *Id.* at 35.

89. *Id.*

90. 120 CONG. REC. 30,459 (1974) (statement of Sen. Comm. Chairman Talmadge); *see id.* at 34,736.

91. *Id.* at 30,459.

92. *Id.* at 34,736 (statement of H. Comm. Chairman Poage).

93. SEC v. Am. Commodity Exch., Inc., 546 F.2d 1361 (10th Cir. 1976); FTC v. Ken Roberts Co., 276 F.3d 583 (D.C. Cir. 2001); Bd. of Trade of Chi. v. SEC, 677 F.2d 1137 (7th Cir. 1982); Chicago Mercantile Exch. v. SEC, 883 F.2d 537 (7th Cir. 1989).

to the CEA's regulatory apparatus."<sup>94</sup> It does not matter whether the underlying instrument would, on a stand-alone basis, be subject to the jurisdiction of another agency.<sup>95</sup> In fact, at least one court has held that the existence of futures is a "zero-sum game" because of the CFTC's exclusivity.<sup>96</sup> The court stated: "an instrument either is or is not a futures contract. If it is, the CFTC has jurisdiction; if it is not, the CFTC lacks jurisdiction; if the CFTC has jurisdiction, its power is exclusive."<sup>97</sup>

FERC has argued that the CFTC does not have exclusive jurisdiction over manipulative conduct involving futures.<sup>98</sup> In support of its position, FERC relies heavily upon *FTC v. Ken Roberts Co.* ("*Roberts*")<sup>99</sup> and points to the court's comment that "while the CFTC has the clear statutory authority to regulate a [trader's] deceitful 'practices' . . . there is no reason to think that this authority is exclusive. A 'practice' or 'course of business' is quite plainly not a 'transaction' . . . [as contemplated by the statute]."<sup>100</sup> FERC's reliance on the court's comment in isolation is misleading and fails entirely when considering the facts of *Roberts* and the court's decision.<sup>101</sup> *Roberts* in fact supports the argument that the CFTC's exclusive jurisdiction applies to all actual futures trading and all transactions involving futures.<sup>102</sup> The court distinguished marketing materials relating to futures from the actual trading of futures.<sup>103</sup> The marketing materials that were the subject of the 'practice' and 'course of business' referred to in that case were determined to be outside the exclusive jurisdiction of the CFTC.<sup>104</sup> However, the court was decisive in explaining that "a set of actions closely linked to the actual trading of commodities" falls squarely within the CFTC's jurisdiction.<sup>105</sup> Thus, whenever there is a transaction

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94. Amicus Curiae Brief of Futures Industry Association, *supra* note 75, at 16 (citation omitted).

95. *Id.* at 34.

96. *Chicago Mercantile Exch.*, 883 F.2d at 547.

97. *Id.*

98. Order Denying Rehearing, *supra* note 1, at 62,068.

99. 276 F.3d 583 (D.C. Cir. 2001).

100. *Id.* at 591.

101. See Amicus Curiae Brief of Futures Industry Association, *supra* note 75, at 30–31.

102. *FTC v. Ken Roberts Co.*, 276 F.3d 583 (D.C. Cir. 2001).

103. *Id.* at 589–91.

104. *Id.* at 591–92.

105. *Id.* at 591.

involving futures contracts, the CFTC's jurisdiction supersedes that of any other agency claiming that it has jurisdiction.<sup>106</sup>

#### 4. The "Enron Loophole"

Through exemptions and exclusions, Congress has carved out certain products and transactions from most requirements of the CEA.<sup>107</sup> In addition to those exemptions discussed earlier for certain options and securities futures products, Congress has excluded or exempted certain categories of other commodities and transactions that could be legally traded in over-the-counter (OTC) markets, subjecting them to varying degrees of regulation and in some cases, minimal CFTC oversight.<sup>108</sup> One of those exemptions, codified in CEA §2(h)(3), allowed for substantial volumes of trading in OTC energy contracts and provided the basis for the alleged misconduct by Enron Corporation and Amaranth Advisers.<sup>109</sup>

##### a. The Origin of the Enron Loophole

Prior to 2000, a number of hybrid products were created that contained futures-like characteristics but also contained elements of other financial instruments that were traditionally outside of the CFTC's jurisdiction.<sup>110</sup> Many of these products were not exchange-traded and were utilized by market participants in bilateral transactions.<sup>111</sup> As discussed earlier, some of these new products led to jurisdictional battles, for example, between the CFTC and SEC.<sup>112</sup> Absent an exemption or exclusion, these new products—if determined to be subject to the CFTC's jurisdiction—would have been subject to the CFTC's exchange trading requirement.<sup>113</sup> Market participants argued, however, that an exchange-trading requirement would have resulted in

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106. *See* Bd. of Trade of Chi. v. SEC, 677 F.2d 1137 (7th Cir. 1982); *see also* Chicago Mercantile Exch. v. SEC, 883 F.2d 537 (7th Cir. 1989).

107. *See generally* MARK JICKLING, CONG. RESEARCH SERV., RS22912, THE ENRON LOOPHOLE 2 (2008).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* Markham, *supra* note 79, at 570.

113. *See* Pantano & Schonback, *supra* note 9, at 4.

an economic burden that would have outweighed the social utility of the products.<sup>114</sup>

In *Transnor (Bermuda) Ltd. v. B.P. North American Petroleum*,<sup>115</sup> the court concluded that the hybrid products were in fact subject to the CFTC's jurisdiction and therefore subject to the CEA's exchange-trading requirements as well.<sup>116</sup> However, the court recognized that most users of the hybrid products were sophisticated parties who do not need the same level of protection as sophisticated parties.<sup>117</sup> Weighing the social utility of the products against the costs borne by market participants if the products were required to be exchange-traded, Congress enacted the Futures Trading Practices Act of 1992 ("FTPA") giving the CFTC authority to exempt various energy contracts and hybrid instruments from the CFTC's jurisdiction.<sup>118</sup> Once the CFTC granted the exemption, market participants were able to enter into bilateral contracts in OTC transactions without the costs of their exchange-traded counterparts.<sup>119</sup>

As the OTC market grew, the CFTC sought greater authority to police those markets.<sup>120</sup> Congress, however, did not believe that additional oversight was necessary and enacted the Commodity Futures Modernization Act of 2000 ("CFMA"), which exempted "two classes of transactions from most substantive CFTC regulation. First, bilateral contracts between 'eligible contract participants' that are not executed on a trading facility . . . . Second, contracts in exempt commodities between 'eligible commercial entities' that are executed on an 'electronic trading facility'."<sup>121</sup> Congress presumed that "most OTC financial derivatives were not susceptible to manipulation and that the counterparties in such transactions did not need the same protections as smaller, unsophisticated market participants who relied on intermediaries to conduct their transactions."<sup>122</sup>

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114. See Markham, *supra* note 79, at 574–75.

115. 738 F. Supp. 1472 (S.D.N.Y. 1990).

116. *Id.* at 1493.

117. *Id.* at 1492.

118. See Markham, *supra* note 79, at 575 (citing the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 502, 106 Stat. 3590, 3629 (1992)).

119. *Id.* at 575, 580–81.

120. *Id.* at 580–81.

121. MARK JICKLING, CONG. RESEARCH SERV., RS22912, THE ENRON LOOPHOLE 2 (2008).

122. Markham, *supra* note 79, at 581.

When Enron collapsed in 2001, it had allegedly exploited the exemptions by trading considerable amounts of physical energy and derivatives contracts on OTC electronic markets.<sup>123</sup> The exemptions subsequently became known as the “Enron Loophole,” presumably because it allowed for significant levels of trading in futures outside the purview of the CFTC.<sup>124</sup>

#### b. The Enron Loophole Has Been Closed

Amaranth Advisers, LLC was a large hedge fund whose primary business was investing in speculative energy trades on The New York Mercantile Exchange (“NYMEX”).<sup>125</sup> NYMEX is a futures trading exchange registered with, and regulated by, the CFTC.<sup>126</sup> Concerned with the potential for large losses, NYMEX required Amaranth to reduce its positions on the exchange.<sup>127</sup> Amaranth complied, but allegedly engaged in regulatory arbitrage by taking advantage of the Enron Loophole to shift its positions to an OTC exempt contract market (“ECM”) known as the Intercontinental Exchange (“ICE”).<sup>128</sup> Like Enron, Amaranth subsequently collapsed and lost \$6 billion as a result of questionable trading practices.<sup>129</sup>

Responding to Enron and Amaranth, Congress enacted the CFTC Reauthorization Act of 2008 (also known as the “ICE Amendments”).<sup>130</sup> The ICE Amendments modified CEA § 2(h) “to provide for CFTC regulation of electronic trading facilities that offer ‘significant price discovery contracts’ in exempt commodities.”<sup>131</sup> Significant price discovery contracts are those:

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123. *Id.* at 586. *See also* HAZEN & MARKHAM, *supra* note 19; MARK JICKLING, CONG. RESEARCH SERV., RS22912, THE ENRON LOOPHOLE (2008).

124. *See* Markham, *supra* note 79, at 586.

125. *See generally* Amaranth Advisors L.L.C., 120 FERC ¶ 61,085 (2007) (order to show cause); *see also* Markham, *supra* note 79, at 583–84.

126. Commodity Exchange Act § 5.

127. *See* Markham, *supra* note 79, at 600.

128. *Id.*

129. *Id.*

130. The CFTC Reauthorization Act of 2008 was enacted as Title XIII of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 13101–13204, 122 Stat. 923, 1427–1442 (2008). The Act is often referred to as the “Farm Bill.”

131. MARK JICKLING, CONG. RESEARCH SERV., RS22912, THE ENRON LOOPHOLE 4 (2008).

(i) [W]ith a settlement price linked to a regulated market's contract, (ii) that may be the subject of arbitrage trading involving exchange-listed contracts, (iii) that are traded in sufficient volume to have an effect on other market prices, or (iv) that are used as a reference point for pricing transactions in other markets. Once the CFTC determines that a contract meets one or more of these criteria, the electronic trading facility becomes subject to exchange-like regulation.<sup>132</sup>

In its action against Amaranth, FERC argued that the CFTC did not have exclusive jurisdiction over manipulation in cases involving exempt commodities.<sup>133</sup> The primary basis for FERC's claim of jurisdiction and its action against Amaranth was that Amaranth's trading practices had a direct link to the prices of natural gas in physical markets.<sup>134</sup> Given Congress' explicit requirement to include "significant price discovery contracts" in exempt commodities within the scope of the CFTC's exclusive jurisdiction, FERC would have no basis whatsoever to make such claims against Amaranth if the ICE Amendments were in place at the time of Amaranth's alleged misconduct.<sup>135</sup> However, the fact that the ICE Amendments were enacted *after* Amaranth's alleged misconduct presumably could have raised the question of whether the CFTC had jurisdiction over the alleged misconduct *before* the ICE Amendments.

FERC's rationale is based on the fact that under the CFMA, the CFTC had little substantive regulatory authority over exempt commodities and excluded commodities traded on ECMs.<sup>136</sup> Indeed, the ECMs were relieved of most registration, reporting, and certain other substantive requirements.<sup>137</sup> FERC, however, failed to acknowledge that the CFTC maintained authority over fraudulent and manipulative conduct arising in exempt markets for exempt and excluded commodities.<sup>138</sup> Therefore, the CFTC, not FERC, had jurisdiction over

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132. *Id.*

133. Order Denying Rehearing, *supra* note 1, at 62,077–78.

134. *See generally* Amaranth Advisors L.L.C., 120 FERC ¶ 61,085 (2007) (order to show cause); *see also* Markham, *supra* note 79, at 583–84.

135. *See* MARK JICKLING, CONG. RESEARCH SERV., RS22912, THE ENRON LOOPHOLE 4 (2008).

136. *See id.* at 3.

137. *Id.*; *see* Markham, *supra* note 79, at 582.

138. Horwich, *supra* note 29, at 374.

Amaranth's alleged manipulative conduct occurring on the regulated NYMEX, as well as the exempt contract market, ICE.

5. *CFTC/FERC Memorandum of Understanding Neither Limits CFTC's Jurisdiction, Nor Expands FERC's Jurisdiction*

Before the CFTC and SEC resolved their jurisdictional dispute over options and security futures products, Congress required that the CFTC "maintain communications" with the SEC and other federal authorities because it recognized that futures and securities markets had become somewhat intertwined.<sup>139</sup> That requirement, however, did not divest the CFTC of its exclusive jurisdiction over those products, nor did it grant to the SEC an expanded jurisdiction or additional powers.<sup>140</sup> Until Congress provided an explicit exception for the SEC over certain options and security futures products, jurisdiction remained with the CFTC.<sup>141</sup>

Similarly, Congress mandated that the CFTC and FERC enter into a memorandum of understanding ("MOU") pursuant to which the parties were required to communicate, share information, and coordinate investigations.<sup>142</sup> More specifically, "the MOU requires the agencies to coordinate their discovery requests; to share information; maintain confidentiality [in most instances]; and to meet regularly."<sup>143</sup> In addition, each agency is required to refer to the other potential violations that are within the jurisdiction of the other agency.<sup>144</sup> According to the Congressional mandate and the specific terms of the MOU, there is no basis to suggest that Congress intended to alter either agency's jurisdiction.<sup>145</sup> To the contrary, Congress recognizes the independent jurisdiction of each agency and requires them to communicate and share information in the same manner that was required to resolve earlier

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139. Markham, *supra* note 79, at 569.

140. Brown-Hruska & Zwirb, *supra* note 68, at 5-6.

141. *Id.*

142. Memorandum of Understanding Between the FERC and CFTC Regarding Information Sharing and Treatment of Proprietary Trading and Other Information (Oct. 12, 2005), *available at* <http://www.ferc.gov/legal/maj-ord-reg/mou.asp>. See Press Release, CFTC, CFTC Chairman Jeffrey and FERC Chairman Kelliher Sign MOU on Information Sharing, Confidentiality (Oct. 12, 2005), *available at* [www.cftc.gov/opa/press05/opa5127-05.htm](http://www.cftc.gov/opa/press05/opa5127-05.htm).

143. See Hilder & Mullins, *supra* note 65, at K-4.

144. HAZEN & MARKHAM, *supra* note 19, at 3.

145. Brown-Hruska & Zwirb, *supra* note 68, at 6.



jurisdictional disputes between the CFTC and the SEC.<sup>146</sup> The jurisdictional lines were not re-drawn as a result of the mandate to “maintain communications,”<sup>147</sup> and contrary to FERC’s assertions, FERC’s jurisdiction has not been expanded as a result of the MOU.

Accordingly, the MOU does not empower FERC to pursue any and all claims of manipulation simply because such conduct may have had an impact on prices in physical markets. The more prudent view is that the information sharing requirement equips FERC with additional tools to (i) ensure that rates within its jurisdiction are “just and reasonable” and “not unduly discriminatory,” and (ii) pursue manipulation that occurs in the purchase or sale of physical energy in interstate commerce, as well as that which occurs in the importation and exportation of natural gas in foreign commerce. FERC’s jurisdiction has not been expanded to permit an encroachment upon the jurisdiction of other federal agencies.<sup>148</sup> If manipulation or wrongful conduct occurs in a market regulated by another federal agency but has an impact on prices in physical energy markets, FERC’s recourse, responsibility, and Congressional mandate is to correct the artificial price movements to ensure they are just and reasonable and not unduly discriminatory.<sup>149</sup>

#### B. THE SEC HAS JURISDICTION OVER SECURITIES MARKETS

Whereas the CFTC has exclusive jurisdiction over futures markets, the SEC has jurisdiction over securities markets.<sup>150</sup> Together, the CFTC and SEC regulate the vast majority of financial markets. However, unlike the CFTC and FERC, the SEC does not have a limiting jurisdictional mandate.<sup>151</sup> It is possible, however, that certain financial instruments that fall within the SEC’s jurisdiction could impact prices in physical energy markets. That does not mean, however, that FERC would have jurisdiction over conduct that occurs within the SEC’s jurisdiction.

For example, it is conceivable that illegal or manipulative short sales could adversely impact the price of a particular energy company’s

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146. See generally Markham, *supra* note 79, at 569–70.

147. *Id.* at 570.

148. See Brown-Hruska & Zwirb, *supra* note 68, at 5–6; see also *In re Hunter Petitioner Brief*, *supra* note 43, at 49.

149. See *FERC Strategic Plan – FERC’s Mission*, *supra* note 2, at 3.

150. See Securities Act of 1933 § 5, 15 U.S.C. § 77e (2006).

151. Demarest, *supra* note 13, at 479–80.

stock. Market fears and concerns about energy supplies could cause energy prices to rise to artificial levels that do not reflect the realities of supply and demand. Does this mean then that FERC is empowered to exercise jurisdiction over illegal or manipulative short sales? Although the illegal or manipulative conduct may have impacted prices in physical markets, the SEC—not FERC—would retain jurisdiction over the matter. FERC, however, would be empowered to correct the pricing anomalies to ensure that rates within its jurisdiction are “just and reasonable,” whereas the SEC would pursue claims against the wrongdoer.

C. FERC’S ENCROACHMENT INTO FINANCIAL MARKETS TO POLICE  
MANIPULATION IS NOT IN THE PUBLIC INTEREST

FERC’s encroachment into financial markets would result in unnecessary costs, duplicative regulation, potentially conflicting legal standards, and multi-agency enforcement actions for the same conduct. Surely, that is not a result that Congress intended when it delegated regulatory authority over financial markets. In the futures markets, for example, Congress asserted that the CEA’s purpose was to serve the public interest through a system of effective self-regulation under the oversight of the CFTC which would, among other things, “deter and prevent price manipulation or any other disruptions to market integrity.”<sup>152</sup> FERC itself has acknowledged that Congress delineated “the responsibility for developing a coherent regulatory program for the commodities industry and to prevent the costs and confusion associated with multiple regulators.”<sup>153</sup> Similarly, Congress created the SEC to restrict speculation and abuses after it concluded that securities exchanges were used for “transactions producing moral and economic waste and corruption.”<sup>154</sup> Thus, Congress created the CFTC and SEC as independent federal agencies to regulate distinct aspects of financial markets without overlapping jurisdiction, even though those markets have converged in certain respects.<sup>155</sup>

FERC argues that its ability to police manipulation in financial markets is “necessary in the public interest or for the protection of

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152. 7 U.S.C. § 5(b) (2006).

153. New York Mercantile Exchange, 74 FERC ¶ 61,311 (1996).

154. H.R. REP. NO. 62-1593, at 47 (1913).

155. See generally Markham, *supra* note 79, at 552; Amicus Curiae Brief of Futures Industry Association, *supra* note 75, at 20.

natural gas ratepayers.”<sup>156</sup> However, the court rejected that argument in *Mobil Oil Corp. v. Federal Power Commission*<sup>157</sup> on the grounds that FERC’s expansive reading of the relevant statute did not comply with the jurisdictional limitations of NGA § 1(b).<sup>158</sup> In fact, the court went so far as to commend FERC for attempting to protect its market, but stated, “it is not sufficient justification upon which to base an expansion of [FERC’s powers] to activities clearly not within its terms.”<sup>159</sup>

FERC’s effort to police manipulation in financial markets is an encroachment that would provide yet another layer of complexity and confusion. FERC’s mission is to ensure that the rates charged for wholesale sales of natural gas and electricity are “just and reasonable.”<sup>160</sup> It is not a financial regulator and does not have the specialized skills that Congress requires of its financial markets regulators.<sup>161</sup> Indeed, if FERC had jurisdiction in financial markets, it would lead to a slippery slope where other federal agencies could also claim jurisdiction within the financial landscape. Surely, Congress did not intend to confound the regulatory landscape for financial markets and promote duplicative and conflicting regulation. To do so would result in increased complexity and costs for market participants and federal regulators alike.

Congress did not intend for federal agencies to compete for power and authority over regulated markets.<sup>162</sup> To the contrary, where it was within the public’s interest, Congress created federal agencies to carry out specified functions and solve problems it had identified.<sup>163</sup> Financial

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156. 15 U.S.C. § 717c-1 (2006).

157. 463 F.2d 256 (D.C. Cir. 1971).

158. *Id.* at 263.

159. *Id.*

160. *FERC Strategic Plan – FERC’s Mission*, *supra* note 2, at 6.

161. *See Amicus Curiae Brief of Futures Industry Association*, *supra* note 75, at 18.

162. *In re Hunter Petitioner Brief*, *supra* note 43, at 47.

163. For example, the CFTC was established as the federal regulatory agency for futures trading; the FERC was established to regulate interstate transmission of electricity, natural gas, and oil; the SEC administers federal securities laws that seek to protect investors, ensure securities markets are fair and honest, and provide the means to enforce securities laws through sanctions; the FTC’s mission is to enhance consumer welfare and protection competition, and prohibit business practices that are anti-competitive, deceptive or unfair to consumers. A host of other federal agencies exist, each with its own unique mission. For a complete list of federal agencies and their respective missions, see <https://www.federalregister.gov/agencies>.

markets regulators were not created with overlapping jurisdiction.<sup>164</sup> However, even where Congress determined that it was prudent to coordinate activities, it was done so with a view towards avoiding duplication and unnecessary costs, not increasing complexity and costs.<sup>165</sup> Any attempt by FERC to police manipulation in financial markets would be contrary to Congress' intent and inconsistent with public policy because it would foster an environment polluted with conflicting legal standards, duplicative regulation, unnecessary costs, and unavoidable confusion.

### CONCLUSION

FERC does not have, and should not have, authority to police manipulation in financial markets even if that conduct has an impact on prices in physical markets. FERC's authority is statutorily limited in scope. FERC's primary mission is to protect natural gas and electricity consumers from exploitation by natural gas companies and electric utilities and to ensure that rates charged for wholesale sales are just and reasonable.<sup>166</sup> FERC was not created as a financial regulator and has no basis, statutory or otherwise, to encroach upon the jurisdiction of federal agencies charged with regulating financial markets, namely the CFTC and SEC. Any attempts to extend FERC's jurisdiction to financial markets would be inconsistent with public policy and undermine Congress' intent to minimize duplicative oversight, conflicting agency regulations and rulings, and unnecessary costs.

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164. See Markham, *supra* note 79, at 569–70.

165. *Id.* at 589.

166. Horwich, *supra* note 29, at 366; see also Order Denying Rehearing, *supra* note 1, at 62,069–70.