

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour (“kWh”) sales to ultimate customers, and do business in every state except Hawaii. Approximately 1,840 of these systems are cities and municipal governments that currently own and control the day-to-day operation of their electric utility systems. Public power systems own almost 10 percent of the nation’s electric generating capacity, but purchase nearly 70 percent of the power used to serve their ultimate consumers.

NRECA and APPA actively participated in the long and arduous process to develop and establish the NAESB WEQ, with the goal of ensuring that small entities such as cooperatives and municipal utilities were provided opportunities to participate at in the development of NAESB standards. NRECA and APPA are themselves members of NAESB, as are a number of their members. NRECA and a number of NRECA and APPA members actively participate in NAESB’s WEQ standards development processes, and as members of the NAESB Board of Directors and the WEQ Executive Committee. At the same time, a substantial number of NRECA and APPA members do not belong to, or participate in the activities of, NAESB. Hence, NRECA and APPA have an interest in the Commission’s proposal to impose NAESB standards on industry participants. NRECA and APPA each filed comments on the Commission’s original NOPR¹ in this docket.²

II. COMMENTS

NRECA and APPA object to the Commission’s current proposal to incorporate by reference into its regulations standards adopted by the NAESB WEQ, and to require public

¹ *Standards for Business Practices and Communication Protocols for Public Utilities*, Notice of Proposed Rulemaking, 111 FERC ¶ 61,204 (2005).

² Comments of the National Rural Electric Cooperative Association, filed in Docket No. RM05-5-000 (July 1, 2005); Comments of the American Public Power Association, filed in Docket No. RM05-5-000 (July 1, 2005).

utilities to incorporate by reference into their OATTs standards that the Commission believes do not require implementing tariff provisions. NOPR at P 13. NRECA and APPA do not object to the substance of the NAESB standards, but to the inclusion of the non-public standards into regulations and OATTs of public utilities. Although the incorporation of privately published standards by reference into a federal agency's regulations may in some instances comply with the barest requirements of the law, the practice is inappropriate here.

First, failure to publish the proposed regulations in the usual manner deprives industry participants that are not able to participate in the time- and resource-intensive NAESB standards development process of either adequate notice or a reasonable opportunity to comment on them before they are enacted. Second, incorporation of these standards into the regulations and OATTs would expose industry participants without knowledge of, or practical access to, these rules to having to defend enforcement action by the Commission based on alleged noncompliance with them. It is inappropriate for the Commission to require industry participants to buy from a private organization copies of the "law" that the Commission intends to make. Further, it is inconsistent with the broad promise of transparency and responsiveness set forth by the current Administration which has committed itself to "an unprecedented level of openness in Government."³ The President has emphasized that government should be transparent because "[t]ransparency promotes accountability and provides information for citizens about what their Government is doing," and directed agencies to "put information about their operations and decisions online and readily available to the public."⁴ The President further stated that

³ Presidential Documents, Memorandum of January 21, 2009, Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,685 (Jan. 26, 2009).

⁴ *Id.*

government should be participatory and directed agencies to “offer Americans increased opportunities to participate in policymaking.”⁵

Recently, Chairman Wellinghoff discussed the importance of compliance in the Commission’s enforcement program, noting that FERC “is committed to providing information and guidance to assist the industry about how to comply with the Commission’s rules and regulations,” and that the Commission is “receptive to suggestions to improve the transparency about how we administer our enforcement program.”⁶ Commissioner Moeller, too, expressed a similar concern when concurring with the Commission’s adoption of its Revised Policy Statement on Enforcement:

The Commission has worked diligently to establish an effective enforcement process. Nevertheless, as I have repeatedly expressed, the Commission can improve its procedures by adding context and transparency to certain aspects of its policies. Those who are subject to Commission penalties need to know, in advance, what they must do to avoid a penalty. . . . The Commission can continue to improve its enforcement policies, just as it can always improve on all that it does. This policy statement recognizes that our policies will be subject to reconsideration and improvement as we gain more experience.^[7]

NRECA and APPA submit these comments now, to urge the Commission to reevaluate its practice of incorporating publicly unavailable business practice standards by reference into its regulations and the OATTs of public utilities, when violation of those OATTs may subject transmission customers to harsh enforcement action, including action seeking potential civil penalties. As discussed below, NRECA and APPA ask that the Commission revisit its decision to incorporate NAESB standards by reference into the *pro forma* OATT and instead promulgate

⁵ *Id.*

⁶ Statement of Acting Chairman Jon Wellinghoff at Skadden 4th Annual Enforcement And Compliance Seminar (February 3, 2009), at 4, available at <http://www.ferc.gov/EventCalendar/Files/20090203084927-02-03-09-wellinghoff.pdf> (last accessed May 20, 2009).

⁷ *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (2008).

its standards by ordinary notice and comment rulemaking; provide substantially greater access to those materials that are promulgated in regulations; or, at a minimum, clarify that FERC will not attempt to assess civil penalties on transmission customers for violations of standards that have merely been incorporated by reference into regulations and OATTs of public utilities. Indeed, NRECA and APPA are unaware of any court decisions that have sanctioned the practice of imposing civil penalties on customers for violation of standards that are not a part of the tariff. While our research does not purport to be exhaustive, NRECA and APPA are further unaware of any instances where the courts have upheld the propriety of imposing civil penalties on persons for violations of unpublished regulations.

A. The Commission Should Reevaluate Its Current Practice of Incorporating Publicly Unavailable Standards by Reference in Light of Potential Civil Liability for *Pro Forma* OATT Violations.

NRECA and APPA are aware that the Commission has previously rejected arguments challenging its practice of incorporating privately drafted, copyrighted standards by reference, including in the instant docket.⁸ In Order No. 676, the Commission incorporated by reference into its regulations (and similarly directed public utilities to incorporate the standards by reference into their OATTs)⁹ an earlier version of the Standards for Business Practices and Communication Protocols for Public Utilities, while rejecting arguments that incorporating copyrighted materials was inappropriate due to limited public access and accompanying fees.¹⁰ And again in Order No. 890, the Commission ordered public utilities to incorporate in their OASIS websites an electronic link to a NAESB website where “any rules, standards and practices that are protected by copyright may be obtained” that “relate to the terms and

⁸ See *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676, 115 FERC ¶ 61,102 (2006) (Docket No. RM05-5-000).

⁹ *Id.* at P 101.

¹⁰ *Id.* at PP 96-98.

conditions of transmission service.”¹¹ But since the time when the Commission began the practice of incorporating privately published rules into its electric regulations, the circumstances surrounding the incorporation of copyrighted materials into the *pro forma* OATT have changed significantly.¹² The enhancement of the Commission’s civil penalty authority in EPAAct 2005,¹³ coupled with the Commission’s refusal to eschew seeking civil penalties from transmission customers for violations of the OATT in Order No. 890,¹⁴ have heightened the unreasonableness of this practice.

Under current Commission policy, industry participants are subject to enforcement action seeking to impose civil penalties of up to one million dollars a day for violations of the OATT.¹⁵ Yet, when they attempt to find the applicable rules in the OATT, they find a citation to outside standards and a link to a website that offers to sell them a hardcopy of the standards. Those standards, although purporting to have the force of law, are not readily available publicly or through standard legal research services. While a copy of the standards as enacted is available for review at FERC’s Public Reading Room in Washington, DC, the standards are otherwise only available to NAESB members and those non-members that pay \$350 for a copy. While the largest industry participants need not worry about limited access, because, as a matter of course, they are all members of NAESB, very large numbers of smaller industry participants are not members of NAESB.

¹¹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, n. 940, *order on reh’g*, Order No. 890-A, FERC Stats & Regs. ¶ 31,261, *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

¹² Thus, NRECA and APPA did not raise this issue in comments they each filed on July 1, 2005, in response to the Commission’s Notice of Proposed Rulemaking in Docket No. RM05-5-000.

¹³ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 691 (2005).

¹⁴ Order No. 890 at PP 835, 847 (potential civil penalties for inadvertent unreserved use), 1523 (potential civil penalties for inaccurate attestation); Order No. 890-A at PP 451 (inadvertent unreserved uses), 920 (network resource attestation).

¹⁵ *See* Order No. 890 at P 1714.

The NAESB document, “NAESB Copyright Policy and Companies with Access to NAESB Standards Under the Copyright Policy, As of May 1, 2009,”¹⁶ itself reveals that not all industry participants have access to the already-enacted standards and/or the currently proposed standards. Accordingly, as a practical matter, many parties subject to the current standards do not have ready access to the full *pro forma* OATT. These parties cannot fully understand their obligations under the OATT or remedy potential violations without tracking down and buying a copy of the referenced standards from NAESB. Nor can they meaningfully participate in the instant proceeding.

In order to remedy potential injustice, the Commission should: (1) cease incorporating NAESB standards by reference into the *pro forma* OATT and instead promulgate its standards by ordinary notice and comment rulemaking; (2) provide substantially greater access to those materials that are promulgated in regulations; (3) or, at the very least, clarify that it will not attempt to assess civil penalties on transmission customers for violations of standards that have merely been incorporated by reference into regulations and OATTs of public utilities.

B. The Commission Should End Its Practice of Incorporating Privately Promulgated, Copyright Standards.

The Commission’s practice of incorporating NAESB standards by reference is unfair and based on questionable legal reasoning. First, when the Commission proposes to update incorporated standards to a new version of those standards, such as in the current NOPR, it places a double burden on non-NAESB members to obtain both the incorporated version of the standards and the updated version proposed for incorporation. Non-NAESB members must pay \$350 each for copies of both versions of the standards.

¹⁶ Available at <http://www.naesb.org/pdf2/copyright.pdf> (Last Accessed May 14, 2009).

In Order No. 676, the Commission attempted to wash its hands of the issue by arguing that it lacked the authority to order NAESB to not charge a fee to obtain its copyrighted materials, or otherwise change NAESB's policies, because NAESB is a private organization outside the bounds of FERC's jurisdiction.¹⁷ The Commission has the authority, however, to prevent the imposition of this injustice in the first place. In this instance, the Commission could promulgate the standards applicable to business practices and communication protocols for public utilities through its ordinary notice and comment rulemaking.

Under the Commission's normal procedure, all stakeholders have notice of and access to the exact proposed changes to the standards without having to pay a \$5,000 membership fee or \$350 to see the finished product. When the Commission adopts standards through incorporation by reference it essentially privatizes its quasi-legislative function. The Commission attempted to justify the practice of incorporation by reference by asserting that it is more efficient or cost effective to simply adopt standards promulgated by private organizations.¹⁸ It is poor policy, however, to forsake the inclusiveness of notice and comment rulemaking for administrative expediency. Notice and comment rulemaking is far more "cost effective" for smaller stakeholders because they have the opportunity to submit comments on the substance of proposed regulations before a neutral arbiter, in this instance FERC, rather than paying \$5,000 upfront in membership costs and /or participating in a time- and resource-intensive private process for standards development.

Additionally, the Commission relies on questionable legal grounds to justify its practice of incorporation by reference. In the instant NOPR, the Commission contends that the National

¹⁷ Order No. 676, at PP 96-97.

¹⁸ Order No. 676, at P 99.

Technology Transfer and Advancement Act of 1995 (“NTT&AA”)¹⁹ “affirmatively requires” all federal agencies to adopt “technical standards” developed by private organizations.²⁰ The Commission, however, takes NTT&AA out of context. NTT&AA applies to practices regarding federal procurement contracts and places no affirmative obligations on agencies outside of that context. Furthermore, the statutory definition of “technical standards” in section 12(d) of the NTT&AA cited by the Commission – “performance-based or design-specific technical specifications and related management systems practices” – does not clearly apply in the context of FERC’s Standards for Business Practices and Communication Protocols for Public Utilities. The Commission simply does not have a statutory obligation to adopt privately promulgated “technical standards” in the current context.

C. The Commission May and Should Provide Substantially Greater Access to the Content of those Standards Enacted into Law.

If the Commission continues its practice of adopting privately promulgated, copyrighted standards through incorporation by reference, the Commission should provide greater access to the content of those standards that it incorporates into the law. The United States Court of Appeals for the Fifth Circuit has upheld the copyright protections afforded model codes but has clarified that once incorporated, the contents of privately promulgated standards become “the law” and are thus not copyrightable.²¹ In *Veeck*, an individual (Mr. Veeck) published the building codes of two municipalities on his non-commercial website in their entirety. Both municipal building codes were incorporated by their respective municipalities by reference to the

¹⁹ Pub L. No. 104-113, 12(d), 110 Stat. 775 (1996).

²⁰ NOPR at P 12.

²¹ *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir 2002) (en banc) (“*Veeck*”); see also *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26, 39 (1st Cir. 2003) (citing *Veeck* for proposition that a model code incorporated into the law becomes part of the “public domain” and, therefore, is not copyrightable).

Southern Building Code Congress International's ("SBCCI's") 1994 edition of its model building code. SBCCI sued Mr. Veeck to enforce its copyright over its model code, but the Fifth Circuit held that Mr. Veeck could republish the building codes of the two municipalities because they represented the law as enacted.²² The Fifth Circuit held that, although SBCCI held a valid copyright over its model code, it could not assert that copyright over duly enacted laws based on its model, because the law itself is not copyrightable.²³

The Fifth Circuit's reasoning in *Veeck* applies with equal force to NAESB standards that FERC incorporates by reference. NAESB, like SBCCI, promulgated these standards for the purpose of incorporation into the law. The *pro forma* OATT is part of "the law," the violation of which can lead to agency action seeking imposition of civil penalties. Any material properly incorporated by reference by the Commission becomes an effective and duly enacted part of its regulations.²⁴ Therefore, anyone, including the Commission, may reproduce the content of those standards incorporated by reference as a permissible restatement of the law.

The Commission may publish the content of any standards that it incorporates into the law. Given the current inability of many smaller industry participants to readily access the full provisions of the *pro forma* OATT as enacted, NRECA and APPA urge the Commission to reproduce the content of those standards to aid in broader transparency and compliance with the law. To that end, the Commission should publish the content of any standards that it incorporates by reference in the *pro form OATT* itself, on the Commission's website, and/or in any final orders that have the effect of incorporating standards by reference. Furthermore, the

²² *Id.* at 800.

²³ *Id.*

²⁴ *See* 5 U.S.C. § 553(a) (2009).

Commission should encourage utilities to publish the contents of incorporated standards as part of their individual OATTs.

If the Commission is unwilling to provide greater access to the content of the standards that it incorporates by reference, it should at least recognize the inequity of any enforcement action against persons or entities that do not have actual knowledge of the standards and undertake not to pursue any such inequitable action.

III. CONCLUSION

NRECA and APPA respectfully request that the Commission adopt the recommendations discussed in these comments in the Final Rule to be issued in this docket.

Respectfully submitted,

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