

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

Incorporation by Reference

)

NARA 12-0002

**COMMENTS OF THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
IN SUPPORT OF PETITION FOR RULEMAKING**

Pursuant to the National Archives and Record Administration ("NARA") Announcement published in the above-referenced docket on February 27, 2012¹, the National Rural Electric Cooperative Association ("NRECA") provides these comments in support of the petition to revise the regulations governing incorporation by reference.² In short, NRECA agrees with the petition that the IBR regulations must be revisited and amended in light of the changed circumstances of the information age, as well as the need to ensure that mandatory regulations are readily accessible to the classes of persons affected by the regulations. At bottom, persons should not have to pay a fee in order to view government-imposed legal standards, and most especially not if violations of those standards may subject persons to severe monetary penalties.

I. INTRODUCTION

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states, or 13 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA's members also include approximately 65 generation and transmission ("G&T") cooperatives, which supply

¹ 77 Fed. Reg. 11,414 (Feb. 27, 2012)("Announcement").

² 1 C.F.R. Part 51.

wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

II. COMMENTS

The Announcement poses several questions for comment, including whether the requirement that material be "reasonably available" means that material to be incorporated by reference should be available for free and available to anyone online, as well as how an extended incorporation by reference review period at both the proposed rule and final rule stages would impact agencies. Rather than address each question separately, NRECA comments here on the matters raised in the petition generally, with reference to certain of the questions posed in the Announcement.

NRECA's membership includes rural electric cooperatives that are subject to and/or affected by the regulations of the Federal Energy Regulatory Commission ("FERC" or "Commission"). Among the standards which FERC incorporates by reference are certain standards adopted by the North American Energy Standards Board ("NAESB"). NAESB is a non-profit standards development organization which develops business practice standards for the wholesale and retail natural gas and electric industries. NAESB's standards development process for its four quadrants (wholesale/retail electric and wholesale/retail natural gas) is consensus-based, which allows an opportunity for industry members to participate in standards development. This "bottom up" approach to standards development serves both the industry and regulators because it results in standards that have been vetted by the diverse majority of NAESB's membership. The NAESB standards development process has been relied upon by FERC as a "far more efficient and cost-effective method of developing technical standards for

the industries . . ."³ The Commission adopts NAESB standards through incorporation by reference and makes them mandatory for compliance by interstate natural gas pipelines and public utilities. For example, FERC currently has pending a Notice of Proposed Rulemaking ("NOPR") in which the Commission proposes to amend its regulations applicable to sales and transportation of natural gas, to incorporate by reference the Version 2.0 business practice standards adopted by the NAESB Wholesale Gas Quadrant.⁴

Notwithstanding the benefits of NAESB and its development of standards, there are limitations to NAESB which are relevant to the incorporation by reference of NAESB materials. First, membership in NAESB is only available for a fee. Second, the NAESB standards are protected by copyright and, as such, are also available only for a fee. NAESB only allows limited viewing of its standards for free online through a "locked" portal for those persons who request and obtain a three-day waiver from NAESB. Thus, those subject to compliance with the NAESB standards that are incorporated by reference into FERC regulations -- which can be enforced through penalties of up to \$1 million per day per violation -- must either apply to NAESB for a limited three-day waiver in order to view the standards, or purchase a copy of the standards. Although NRECA is a member of NAESB and actively participates in the NAESB standards development processes, a substantial number of NRECA's members do not belong to or participate in the activities of NAESB. Even if NRECA is allowed to view the standards by virtue of its NAESB membership, NRECA is not allowed to share the standards with its membership even though NRECA members stand to be affected by the NAESB standards once they are incorporated by reference as mandatory FERC regulations.

³ *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-E, 129 FERC ¶ 61,162 at P 116 (2009) ("Order No. 676-E").

⁴ *Standards for Business Practices for Interstate Natural Gas Pipelines*, 138 FERC ¶ 61,124 (2012).

Previously, NRECA and the American Public Power Association ("APPA") objected to the Commission's proposal to incorporate by reference the NAESB Wholesale Electric Quadrant standards.⁵ For convenience, a copy of the NRECA/APPA comments is attached. In short, NRECA and APPA demonstrated that incorporation by reference of non-public standards is inappropriate because (1) failure to publish proposed regulations in the usual free and publicly-available manner deprives industry participants of either adequate notice or a reasonable opportunity to comment on them before they are enacted; and (2) incorporation of the standards into the Commission's regulations exposes industry participants to the risk of enforcement action by the Commission for alleged non-compliance with regulations for which they may have only limited knowledge. NRECA and APPA urged FERC to reconsider prior rejection of arguments challenging its practice of incorporating private, copyrighted standards by reference, given the Commission's enhanced enforcement authority under the Energy Policy Act of 2005.⁶

In an order issued on November 24, 2009, FERC refused to reconsider its policy of incorporating by reference the NAESB standards.⁷ The Commission found that the benefits of the NAESB consensus process outweigh "whatever costs non-members may incur in having to obtain copies of the standards."⁸ FERC reasoned that the requirements of the Administrative Procedure Act ("APA") and federal regulations⁹ that material incorporated by reference must be reasonably available to the public is satisfied by making the NAESB material available at the Office of the Federal Register and at the Commission headquarters in Washington, D.C., and

⁵ *Comments of the National Rural Electric Cooperative Association and the American Public Power Association on Notice of Proposed Rulemaking*, filed in FERC Docket No. RM05-5-013 on May 26, 2009.

⁶ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 691 (2005).

⁷ Order No. 676-E at PP 115-121.

⁸ *Id.* at P 117.

⁹ FERC's discussion of the incorporation by reference regulations cited to provisions of 1 C.F.R. Part 51, the same regulations at issue in the Announcement. *See* Order No. 676-E at P 118, notes 104-105.

available from NAESB through either the limited 3-day waiver or for a fee.¹⁰ According to FERC, the \$900 fee for non-members to obtain the standards was not prohibitive "given the costs of otherwise participating in a notice and comment rulemaking proceeding."¹¹ The Commission also noted that OMB Circular A-119 requires government agencies to protect the copyright of materials to be incorporated by reference.

NRECA supports and appreciates the work performed by NAESB on behalf of the wholesale and retail electric and natural gas industries. To be clear, NRECA's objection to FERC's incorporation by reference of non-public NAESB standards is not a criticism of NAESB at all. Instead, NRECA objects to the regulations governing incorporation by reference because they allow such "pay to play" processes to satisfy the APA's "reasonably available" requirement. Absent a change to the regulations governing incorporation by reference (1 C.F.R. Part 51), FERC and other agencies can be expected to continue their policy that any level of availability, even if for a fee or severely limited, is sufficient to satisfy the "reasonably available" requirement of the APA. However, for the reasons set forth in the petition and NRECA's comments before FERC, availability for a fee or by limited waiver does not render as "reasonably available" regulations with which entities must comply under threat of enforcement actions and significant penalty. Given the public's reliance upon the internet in order to both view agency postings and submit comments and other pleadings, it is patently unreasonable to consider hard copies available only in agency offices in Washington, D.C., as a contributor to meeting the "reasonably available" standard. NRECA's members are located throughout the country and should not have their ability to participate in rulemaking processes and ensure compliance with mandatory regulations hinge upon being able to travel to Washington, D.C. to view proposed and adopted

¹⁰ *Id.* at P 118.

¹¹ *Id.*

standards in hard copy. Federal agencies routinely encourage electronic filings and submissions, even mandate that regulated entities make information available for free, via the internet, in certain circumstances.¹² No less should be required of the government in adopting mandatory standards and regulations. Moreover, the laws and regulations of the federal government must not be tied to any fee whatsoever, particularly where compliance is not optional. Instead, in response to Issue 1 in the Announcement, "reasonably available" means that material should be available for free and to anyone online. NRECA recognizes that even with material available online and in hard copy, for free, there may still be some potentially affected persons who will not have access to material subject to incorporation by reference.¹³ Nevertheless, revising the incorporation by reference regulations so that they are more in line with the policies of transparency in government and the public's reliance upon the internet should greatly reduce the number of affected persons who do not have access to such material.

The Announcement poses the question whether "class of persons affected" needs to be defined and, if so, how. If the regulations governing incorporation by reference are improved to require that such material be made publicly available to anyone online, for free (and for an unlimited duration), then there should be no need to define "class of persons affected." By making materials which are the subject of incorporation by reference available to everyone, via the internet, without a fee or any other restriction, the materials would be reasonably available to any "class of persons affected." To that end, NRECA notes that unless materials are made available online, for free, to anyone, affected persons might not even know that they stand to be affected since they will not have access to the material.

¹² For example, the FERC requires that regulated entities post their rate schedules on the Commission's eTariff website, and FERC encourages parties to file pleadings electronically rather than in hard copy format.

¹³ See Announcement Question 1.b.

Finally, on this point, the "pay to play" aspect of the incorporation by reference regulations is particularly disadvantageous to smaller entities who may not be able to participate in the time- and resource-intensive development of material which will be incorporated by reference, but nevertheless stand to be affected by the material. Given the focus on small businesses by Congress and the current Administration, the restricted ability to access materials subject to incorporation by reference runs counter to national policy.¹⁴

Questions 3 through 9 of the Announcement address the cost, procedural impacts and authority over revised incorporation by reference regulations. NRECA agrees with the Petition that before imposing on the public the costs of accessing laws with which they must comply, agencies should have to demonstrate efforts to contain those costs, including an explanation of the costs the agency would incur in order to make the material available for free online. Moreover, before relying on the oft-repeated justification that standards developing organizations ("SDO") rely on the revenue from sales of materials incorporated by reference, there should be an inquiry into the extent to which the SDO relies on sales of the standards themselves, as opposed to recovering revenues from other sources such as membership dues.

NRECA takes no position at this time on the procedural and authority impacts posed in Questions 5 through 9 of the Announcement, except to say that in order for the revised IBR regulations to have the effect of making proposed and adopted material reasonably available to

¹⁴ See, e.g., the Jumpstart Our Business Startups Act, H.B. 3606, which includes initiatives to provide access to capital to small and startup businesses; and the Patient Protection and Affordable Care Act, Public Law 111-148, which includes a Small Business Health Care Tax Credit to help small businesses afford the cost of covering their workers.

affected persons, the Office of the Federal Register must have the authority to deny incorporation by reference approval if the material is not available online for free.¹⁵

III. CONCLUSION

NRECA appreciates the opportunity to submit these comments. For the reasons discussed above, NRECA supports the petition and urges the NARA to revise the regulations at 1 C.F.R. Part 51 to require that material to be incorporated by reference must be made available online, to anyone, without any fee or limitation on access.

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Dated: March 28, 2012

¹⁵ See Announcement Question 6.

ATTACHMENT

Comments of the National Rural Electric Cooperative Association and the American Public Power Association on Notice of Proposed Rulemaking, filed in FERC Docket No. RM05-5-013
on May 26, 2009

Standards for Business Practices and)
Communication Protocols for Public Utilities) **Docket No. RM05-5-013**

Pursuant to the Commission’s March 19, 2009, Notice of Proposed Rulemaking (“NOPR”) 126 FERC ¶ 61,248 and the April 3, 2009, Notice of Extension of Time issued in the instant docket, the National Rural Electric Cooperative Association (“NRECA”) and the American Public Power Association (“APPA”) respectfully submit the following comments on the Federal Energy Regulatory Commission’s (“FERC’s” or the “Commission’s”) proposed changes to the North American Standards Board (“NAESB”) Wholesale Electric Quadrant (“WEQ”) Standards for Business Practices and Communication Protocols of Public Utilities submitted to the Commission on February 19, 2009 by NAESB.

NRECA is a not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives. The great majority of these cooperatives are distribution cooperatives that provide retail electric service to over 42 million consumer-owners in 47 states. NRECA's members also include approximately 65 generation and transmission ("G&T") cooperatives, which supply wholesale power to their distribution cooperative owner-members. NRECA's membership includes both transmission-owning and transmission-dependent utilities ("TDUs").

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 EPAct 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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May 26, 2009