



NORTH AMERICAN ENERGY STANDARDS BOARD

801 Travis, Suite 1675 • Houston, Texas 77002 • Phone: (713) 356-0060 • Fax: (713) 356-0067
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April 29, 2014
Submitted via email

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

RE: "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"

Dear Administrator Shelanski,

NAESB appreciates the opportunity to offer these comments regarding the Office of Management and Budget's Notice of Availability and Request for Comments on proposed revisions to Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities." We offer the following general comments for your consideration provided in Attachment A and direct you to the 2006 Energy Law Journal article "North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization,"¹ authored by the NAESB General Counsel, William P. Boswell. We are available to answer any questions or provide any additional information.

With Best Regards,

Rae McQuade

Rae McQuade, President, NAESB

cc: Michael Desselle, Chairman of the NAESB Board of Directors
William P. Boswell, NAESB General Counsel
Jonathan Booe, Vice President, NAESB

¹ William P. Boswell & James P. Cargas, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization*, 27 Energy L. J. 47 (2006).



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Attachment A
April 29, 2014
Page 1 of 3

Comments of the North American Energy Standards Board

The North American Energy Standards Board (NAESB) is an American National Standards Institute (ANSI) accredited, non-profit standards development organization formed in 1994 for the purpose of developing voluntary consensus standards and model business practices that streamline the transactional processes of the natural gas and electric industries by promoting more competitive and efficient services in the wholesale and retail markets. Over the past twenty years, NAESB and its predecessor organization, the Gas Industry Standards Board, have developed more than three thousand voluntary consensus standards for the energy industry with the support of the Federal Energy Regulatory Commission, the U.S. Department of Energy, the North American Electric Reliability Corporation, the National Association of Regulatory Utility Commissioners, and state utility commissions, among other government and industry entities. NAESB maintains more than two thousand participants who are active in the standards development process and a membership body consisting of over three hundred corporate members who represent the wholesale gas, wholesale electric, retail gas, and retail electric markets.

NAESB adheres to the ANSI principles of openness, balance of representation, due process, consensus, and the availability of an appeals process. Every step of the NAESB process is fully documented through agendas, work papers, minutes, voting records, and transcripts in order to provide complete transparency of actions taken and decisions made in the creation of the standards. The standards are voluntary, industry driven, and only made mandatory by regulatory bodies in the event that they are adopted through the process of incorporation by reference.

NAESB supports the proposed revisions to the Office of Management and Budget (OMB) Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (the Circular). U.S. policy has consistently established that voluntary consensus based private sector standards are preferable to government-unique standards. This strategy has been employed as voluntary consensus standards enhance U.S. growth, while reducing federal procurement and operating costs. The revised Circular further emphasizes the stated policy by encouraging agencies to continue to support voluntary consensus standards and the underlying intellectual property rights of the standards development organizations that publish those standards.

While U.S. policy supports voluntary consensus based standards, that policy also works to observe and protect the critical intellectual property rights relied upon by the standards development organizations. In the revised Circular, the OMB seeks comment on whether it should consider providing more specific guidance for agencies with respect to intellectual property rights. NAESB work products are protected by federal copyright with exclusive rights given to NAESB regarding the reproduction, distribution, adaptation and display. Copyright protection assures market participants that they are making use of both the correct and the most current version of the NAESB standards. NAESB agrees with the OMB assertion that the public interest would not be well-served by requiring standards incorporated by reference to be available free of charge.

Like many standards development organizations, the NAESB business model relies upon the revenue generated from the sales of standards to support its activities and continue to develop and maintain standards. This revenue supports the organization in two ways. First, as a source of revenue used to offset operating expenses and, second, and more importantly, as a means of assuring that interested parties join and remain members of NAESB, which would be significantly compromised were our standards uniformly available without cost. Having such a revenue model allows NAESB to support the development of its standards at a modest membership fee and an equally modest fee for purchase of standards. If the standards were available without cost, the incentive to join NAESB as a member would diminish, and if that were to occur in large enough numbers our ability to develop and maintain new and existing standards could be compromised. Any further guidance provided to agencies with respect to



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Attachment A
April 29, 2014
Page 2 of 3

intellectual property rights and standards development organizations should recognize the necessity of support for both the copyrighted materials and the copyright policies of the standards development organizations during all phases of standards development, including commentary processes.

The OMB proposes the adoption of recommendations from the Administrative Conference of the United States (ACUS)¹, in regards to the determination of whether a voluntary standard is “reasonably available.” NAESB generally supports the ACUS recommendation and offers the following comments for ensuring incorporated materials are reasonably available.

NAESB work products that are subject to adoption by regulators are made available to requesting interested parties during the rulemaking process through multiple means, including software that provides read-only access at no cost. Following promulgation, the standards are made available through a number of methods: individual purchase; participation in NAESB courses; membership within the organization; and free public electronic access for an evaluative period. In addition, parties may request a cost-free waiver of the reasonable purchase price of the standards; such requests are considered on a case-by-case basis. Agency employees are encouraged to participate in the NAESB standards development process and have free access to any of our work products. NAESB will continue to ensure that access to the standards is made reasonably available to all interested parties through several options for review that provide for optimal accessibility.

ACUS provides considerations that an agency should take into account when deciding whether to incorporate a particular copyrighted material by reference and in working with a copyright holder to ensure that the material is reasonably available. In response, NAESB would like to reiterate that all NAESB work products are readily accessible during the rulemaking process of regulated entities. Furthermore, the standards are reasonably available to small businesses. “The Small Business Administration’s Office of Size Standards has established a size standard, for electric utilities, electric power distribution, and electric bulk power transmission and control, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed four million megawatt hours.”² The Small Business Administration defines a small entity for pipeline transportation of natural gas as having a maximum annual receipt of \$25.5 million dollars.³ The Federal Energy Regulatory Commission estimated a total of 39 “small” entities (or 12.8 percent of the total 304 entities) to be existent in its natural gas and electric jurisdiction as of November 15, 2013.⁴ Appropriate consideration of the size and nature of business structures in the natural gas and electric industry, yields the conclusion that the cost to obtain a copy of NAESB standards is nominal and should be treated as a cost of doing business. With this in mind, it is also important to note that companies relying on standards can run the gamut in both size and organizational structure and that standards development organizations may not have the administrative resources to commit to the creation and maintenance of a scaled fee structure that is based on the size of each regulated industry entity and other interested parties.

When an agency considers incorporating by reference highly technical material, ACUS recommends that agencies include in the notice of proposed rulemaking an explanation of the material. NAESB will continue to support agencies interested in NAESB standards by drafting reports that generally describe the new standards and modifications to existing standards that are included in each new standards publication. This practice has been in

¹ Administrative Conference of the United States Recommendation 2011-5, *Incorporation by Reference*, Administrative Conference, 77 Fed. Reg. 2257 (Jan. 17, 2012). Available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-01-17/html/2012-621.htm>.

² Order No. 787, *Communication of Operational Information Between Natural Gas Pipelines and Electric Transmission Operators*, FERC Stats. & Regs. ¶ 31,350 (2013), 78 Fed. Reg. 70,163, 70,187 (Nov. 22, 2013) (citing 13 CFR 121.201, Sector 22, Subsector 221, Utilities & n.1 (2012)). Available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-11-22/pdf/2013-28078.pdf>.

³ Order No. 787, (citing 13 CFR 121.201, Sectors 48-49, Subsector 486).

⁴ Order No. 787, FERC Stats. & Regs. ¶ 31,350 (2013), 78 Fed. Reg. 70,163, 70,187 (Nov. 22, 2013).



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Attachment A
April 29, 2014
Page 3 of 3

place for many years and is intended to provide a high level summary of modifications made to the NAESB standards between versions for both regulatory bodies and industry participants that may be responsible for implementing the standards if adopted, as hundreds of standards are typically modified or added between publications. These summaries also supplement the extensive documentation maintained throughout the standards development process, including meeting minutes, transcripts and voting records, which can total hundreds, if not thousands of pages.

The recommendation is not clear as to how detailed such “summaries” must be; however, a summary should not be a repetition of the standard itself. Requiring overly detailed descriptions of the hundreds of individual standards in the materials incorporated by reference will present unintended challenges to regulatory bodies attempting to adopt copyright protected works. The sole purpose of summaries should be to alert potentially affected parties to items which may be of interest to them. That said, once the alert has been made it is incumbent upon the potentially affected party to read the text itself. Having an overly detailed summary is problematic for two reasons: first, it is not a substitute for the text, and second, agencies should not be placed in the position of having to argue, much less litigate, whether the summary was “detailed enough” and thus place form over substance. Any affected parties are bound by the full text of the rule(s), not the summary.

NAESB appreciates the opportunity to respectfully submit these comments. Please feel free to contact Jonathan Booe, Vice President, North American Energy Standards Board, at naesb@naesb.org or 713-356-0060, should you need additional information.
