

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Electricity Market Design and Structure

| Docket No. RM01-12-000

**JOINT FILING OF THE AMERICAN PUBLIC  
POWER ASSOCIATION, NATIONAL RURAL  
ELECTRIC COOPERATIVE ASSOCIATION, AND  
THE TRANSMISSION ACCESS POLICY STUDY  
GROUP REGARDING BUSINESS STANDARDS  
DEVELOPMENT PROCESS**

The American Public Power Association (“APPA”), the National Rural Electric Cooperative Association (“NRECA”), and the Transmission Access Policy Study Group (“TAPS”) jointly respond to the December 19, 2001 Order Providing Guidance on the Formation of a Standards Development Organization for the Wholesale Electric Industry, 97 F.E.R.C. ¶ 61,289 (2001) (“December 19 Order”). As discussed in more detail below:

- Whatever business practice standards setting model is developed, the North American Electric Reliability Council’s (“NERC”) role in developing and adopting reliability standards must be preserved. APPA, NRECA and TAPS support the Comments of the North American Electric Reliability Council on the Formation of a Standards Development Organization for the Wholesale Electric Industry (“NERC Comments”) and the division of responsibility and process for coordination between NERC and the North American Energy Standards Board (“NAESB”) outlined in that pleading, filed today.
- We can support the concept of business practices established through a NAESB-like process if and only if fundamental concerns about NAESB’s structure and the processes proposed for the Wholesale Electric Quadrant (“WEQ”) in the IOU Group Pleading<sup>1</sup> are addressed.<sup>2</sup>

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<sup>1</sup> Our comments on the IOU Group Pleading are based upon the draft version of the filing (then entitled “Joint Filing on the Formation of a Standards Development Process for the Wholesale Electric Industry”) circulated on March 11, 2002 by the Edison Electric Institute and NAESB. Our understanding is that approximately fifteen entities, primarily investor-owned utilities, have joined as signatories to the pleading.

- NAESB's single segment veto severely limits the ability to craft segments in a way that would ensure that the views of wide diversity of industry participants are fairly reflected.
- While the IOU Group Pleading does not definitively permit multiple segment representations for single entities (*i.e.*, vertically-integrated utilities), such a rule would defeat the purpose of achieving a true industry-wide consensus, as opposed to merely a consensus of the divisions of the largest market participants.
- An independent professional staff is needed to facilitate a result not tilted towards the interest of the most well-funded market participants that can "volunteer" their drafting services.
- "Pay to play" funding will not yield the broad representation necessary for credibility as a legitimate industry "consensus" process.
- In establishing a consensus business standards development body, the Commission needs to carefully preserve its authority to fully review proposed standards for consistency with the FPA and to ensure that these standards appropriately implement the standard market design ultimately adopted by the Commission.

APPA, NRECA and TAPS ask the Commission to provide clear direction to the industry on these issues. We believe that the industry will not make further progress toward creation of a single organization to develop business practice standards and communication protocols absent specific Commission directives on the fundamental issues that have so severely divided the industry during these months of exhaustive and expensive negotiations, and that have led to the highly splintered filings we expect to be made in this proceeding in response to the December 19 Order.

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<sup>2</sup> We would also support having business and reliability standards established under the NERC umbrella, with business practice standards adopted through a consensus process overseen by the NERC Board, while reliability standards would continue to be subject to the judgment of the independent NERC Board. *See* February 8, 2002 Additional Comments of Roy Thilly, available at [ftp://www.nerc.com/pub/sys/all\\_updl/docs/shc/thilly2-wesm.pdf](ftp://www.nerc.com/pub/sys/all_updl/docs/shc/thilly2-wesm.pdf). As discussed below, however, in response to certain market participant industry objections, the NERC Board at its February 20 meeting pulled back from its previously-announced interest in including business practice standards development

We can and will work out details. But first, the Commission must make the policy calls to limit subsequent collaborative work to such details.

**I. DESCRIPTION OF APPA, NRECA AND TAPS**

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 in the United States. Approximately 1,870 of these systems are cities and municipal governments that currently own and control the day-to-day operation of their electric utility systems. They purchase nearly 70 percent of the power used to serve their ultimate customers. Public power systems own about 8 percent of the nation's high voltage transmission lines, although many of these lines are configured to deliver energy to our load centers, not to provide transmission service in interstate commerce. On balance, public power systems buy much more energy and transmission than they sell to third parties.

NRECA is a not-for-profit national service organization representing 930 not-for-profit, consumer-owned rural electric cooperatives located in 46 states. NRECA's members serve more than 35 million end use electric customers. NRECA's membership includes both transmission-owning and transmission-dependent utilities. While NRECA members do generate their own power and make sales of power to third parties in wholesale markets, electric cooperatives on the whole are net buyers of power.

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under its aegis.

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.<sup>3</sup> As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members are vitally interested in issues of industry structure, reliability and the business practices applicable to participation in electricity markets. TAPS and its members have commented upon and been involved in nearly all aspects of electric industry restructuring activities both before this Commission and in the legislative arena.<sup>4</sup>

Together, APPA, NRECA and TAPS serve approximately one-quarter of the country's electric load.

## **II. THE TASK AT HAND: ESTABLISHING A SINGLE STANDARD SETTING PROCESS FOR BUSINESS PRACTICES AND COMMUNICATION PROTOCOLS**

The Commission's December 19 Order asked the industry to come to agreement on a single organization to develop business practices and communications protocols to support FERC's to-be-developed standard market design:

1. The Commission is in the process of developing a Notice of Proposed Rulemaking (NOPR) dealing with market design for the wholesale electric market. As part of this process, standards governing business practices and electronic

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<sup>3</sup> TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power, Inc. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority, Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

<sup>4</sup> Since 1989, when TAPS developed a formal position favoring fair transmission access through joint planning and use, TAPS has been actively involved in seeking fair and non-discriminatory transmission access for all users. *See Proposal of the Transmission Access Policy Study Group for Adoption and Implementation of a Fair Access Transmission Policy in The Transmission Task Force's Report to the Commission*, App. H, 253-267 (FERC, Oct. 1989). In the legislative process that led to the Energy Policy Act of 1992, TAPS continued to advocate strong transmission access provisions. TAPS has submitted comments in most of the FERC's rulemaking proceedings involving transmission access or pricing issues.

communications are needed to complement the market design principles we develop. Once the Commission develops its market design principles, wholesale business practice and communications standards must be developed as soon as possible thereafter so that the industry can operate efficiently under the market design principles.

2. We prefer that the industry develop these business practice standards and communication protocols by establishing a single consensus, industry-wide standards organization for the wholesale electric industry.... To ensure that a mechanism is in place to develop these crucial standards when the market design principles are established, we request that the various participants in the wholesale electric industry agree on a single standards organization to develop wholesale electric standards by March 15, 2002.

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6. The Commission is confident that, based on the characteristics outlined above, the industry can cooperate in creating a single standards organization that will develop a consistent set of national business practice and communication standards that will serve to create an integrated wholesale electricity market that promotes competition and enhances efficiency.

December 19 Order, 97 F.E.R.C. at 62,301-02. The Commission also made clear that it would take action if the industry did not reach consensus by March 15 (*id.* at 62,301):

If the industry does not agree, by March 15, 2002, on a single standards organization, we will institute our own procedures either to choose an organization to develop such standards or to develop the standards ourselves.

APPA, NRECA and TAPS each participated in this intensive and expensive effort, to the limits of each of our resources. As discussed in the IOU Group Pleading, the effort spanned the country, involving numerous meetings.

Despite the substantial efforts put in by APPA, NRECA, TAPS, and others, this intensive and costly process did not yield an industry-wide consensus. In the absence of clear directives from the Commission on the fundamental issues described below, future industry efforts to create a single business standards setting organization will be protracted and in all likelihood, unsuccessful.

**III. WHATEVER BUSINESS PRACTICE STANDARD SETTING PROCESS IS ADOPTED, THE ROLE OF THE INDEPENDENT NERC BOARD IN DEVELOPING AND ADOPTING STANDARDS TO SAFEGUARD RELIABILITY MUST BE PRESERVED**

At the time the Commission issued its December 19 Order, both NERC and NAESB were seeking to act as the organization to set wholesale electric business standards. On October 16, 2001, the independent NERC Board, at the urging of its Stakeholder Committee, adopted a resolution providing that NERC would promptly:<sup>5</sup>

Take all necessary steps to become the single organization in North America to develop both reliability standards and wholesale electric business practice standards through a fair, open, balanced, and inclusive process....

APPA, NRECA and TAPS were (and would continue to be) supportive of the concept of standard setting for both reliability and business standards going forward under NERC. If implemented, such a structure could have provided the efficiency of a more appropriate, single set of segments, and a single payment of dues, under the supervision of an independent Board, acting with the support of a knowledgeable professional staff.<sup>6</sup> NERC's initiative, however, met with resistance from some market

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<sup>5</sup> Resolution on the Role of NERC in Developing Market Interface or Commercial Practice Standards (Oct. 16, 2001), available at [ftp://www.nerc.com/pub/sys/all\\_updl/docs/bot/BoardResolutions10-16-01/pdf](ftp://www.nerc.com/pub/sys/all_updl/docs/bot/BoardResolutions10-16-01/pdf).

<sup>6</sup> The development process for business and reliability standards could have been largely integrated, but business practices could appropriately be established by stakeholder consensus process overseen by the NERC Board, while as to reliability standards, the NERC Board would continue to exercise independent judgment. See February 8, 2002 Additional Comments of Roy Thilly, available at

participants who preferred to consolidate all standard setting under NAESB's purely stakeholder-controlled process.

By resolution adopted February 20, 2002, NERC removed itself from consideration as the organization to establish business practice standards and communications protocols, leaving the field open to others (presumably NAESB). The NERC Board reaffirmed its mission to develop, adopt and enforce reliability standards, while providing for coordination with the business practice standards development organization:<sup>7</sup>

BE IT THEREFORE RESOLVED that NERC will, through a fair, open, balanced, and inclusive process, continue to set, monitor, and enforce compliance with standards for the reliable operation and planning of interconnected electric grids throughout North America, and

BE IT FURTHER RESOLVED that NERC will work with other electric industry organizations to create a workable process to coordinate NERC's standards with the development of related standards, and

BE IT FURTHER RESOLVED that NERC will work with other electric industry organizations on the development of a joint filing by March 15 in response to the Commission's December 19 order.

The NERC Board's February 20 action is fully consistent with the Commission's December 19 Order, which recognizes the need to closely coordinate development of business practice and reliability standards, but does not call for combining the two into a single process:

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<http://www.nerc.com/~filez/wesm.htm>.

<sup>7</sup> Resolution on Responsibility for Reliability Standards (Feb. 20, 2002), available at [ftp://nerc.com/pub/sys/all\\_updl/docs/bot/FinalBoardResolutions-WESM2-20-02.pdf](ftp://nerc.com/pub/sys/all_updl/docs/bot/FinalBoardResolutions-WESM2-20-02.pdf).

5. In establishing the structure and characteristics of a standards organization to develop wholesale electric business practice standards, the industry also should adopt a *process to coordinate* between wholesale electric business practice standards and other standards that impact the integrated North American electric grid. Business practices for wholesale electric transactions may be integrally linked with certain reliability standards since reliability requirements often overlap with business practices; for example, congestion management supports reliability, but also may significantly affect business practices. ... In its deliberations, the industry should consider the best process for achieving effective *coordination* between these *related* standards.

December 19 Order, 97 F.E.R.C. at 62,301-02 (emphasis added).

Further, the NERC Board's February 20 action is consistent with its reliability mission to protect the reliability so essential to our economy. In our view, reliability must be preserved at the current level or improved. Therefore, it is critical that business practice standards and communications protocols conform with both NERC's reliability standards and this Commission's standard market design.

Notwithstanding the December 19 Order's directive and the NERC Board's February 20 action, which cleared the way for a NAESB-like organization to act as the single standard setting organization for business practices and communications protocols, much of the industry effort since December was focused on the NERC-NAESB coordination issue. While APPA, NRECA, TAPS and others strongly believe that NERC should continue to fulfill its critical reliability mandate, others sought to minimize if not eliminate NERC's role.

No consensus was reached on the NERC-NAESB coordination issue, and is unlikely to be achieved without clear direction from this Commission. Nevertheless, the

extended discussions on this issue resulted in a set of principles that describe the complementary roles of NERC and NAESB, outline a mechanism for their close coordination, and list elements that could be included in a future Memorandum of Understanding between the two organizations. APPA, NRECA and TAPS support these principles, included in the NERC Comments (at 4-7), as a reasonable means to:

- maintain NERC's role in developing reliability standards, through its own processes that recently have been revamped after an extended and thorough vetting, and which the independent NERC Board will continually review.
- keep reliability in the hands of an independent board, subject to Commission oversight when reliability standards are incorporated in a tariff, instead of relegating reliability to a stakeholder-controlled process of the sort that this Commission has found unworkable in the ISO/RTO context.<sup>8</sup>
- provide for clear and meaningful coordination between development of reliability standards and the business practices needed to support the market mechanisms to be put in place through the Commission's standard market design.

In contrast, the IOU Group Pleading draws a vague line between NERC's "policy- setting" "what" function and NAESB's "standard-setting" "how" function, which could be read to inappropriately restrict NERC's Board from adopting the standards it deems necessary to ensure reliability.<sup>9</sup> During the industry process, some generators and marketers sought strenuously to put market participants in the position of limiting what NERC could do, *e.g.*, by requiring all NERC "policies" to go through the

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<sup>8</sup> See, *e.g.*, *Bangor Hydro-Electric Co., et al.*, 96 F.E.R.C. ¶ 61,063, at 61,259 (2001), *reh'g pending*.

<sup>9</sup> There may be instances where a NERC standard may appropriately include elements that at least some industry participants might characterize as more of a "how" than a "what." NERC must be able to establish, for example, the specific rules for how, when and what data entities must submit to demonstrate compliance. NERC also establishes training and certification standards for system operators, which necessarily describe how such persons or their organizations demonstrate compliance.

NAESB stakeholder-controlled process before they could be adopted and enforced by NERC.

In contrast, we oppose putting stakeholders in the position of restricting the independent judgment of the NERC Board as to what needs to be included in a reliability standard. It is for this Commission, not industry participants, to determine whether NERC is intruding on the Commission's tariff, its standard market design, or the market mechanisms the Commission is seeking to promote.

As for the benefits claimed for "one stop shopping" in the development of reliability and business standards, a single process could come at a very high price if reliability standards are left to a stakeholder-controlled process that can subordinate them to commercial concerns.

**IV. WE CAN SUPPORT BUSINESS PRACTICE DEVELOPMENT THROUGH A NAESB-LIKE PROCESS IF FUNDAMENTAL CONCERNS ARE ADDRESSED**

The IOU Group Pleading proposes to develop wholesale electric standards through the "Wholesale Electric Quadrant" of NAESB, and includes (as an attachment) a flowchart setting forth that process in schematic form. While APPA, NRECA and TAPS would continue to support the concept of NERC overseeing standard setting for both reliability and business practices, we can support the concept of development of standardized business practices and communications protocols through a NAESB-like process if and only if our fundamental concerns with NAESB and elements of that process as set forth in the IOU Group Pleading can be adequately addressed. We therefore urge the Commission to provide clear directives at this juncture.

**A. *NAESB's One-Segment Veto Severely Limits the Ability to Craft Segments that Reflect the Diversity of Interests in the Electric Industry***

The December 19 Order reflects the Commission's desire to develop a consensus-based standard setting process that reflects the full range of views reflected in the electric industry:

Since *all* segments of the industry must conduct business and operate under these standards, it is appropriate that the standards reflect a reasonable consensus of the *entire* industry.

97 F.E.R.C. at 62,301 (emphasis added).

The IOU Group Pleading echoes the Commission's view that segments should reflect the important goal of giving voice to all industry viewpoints.<sup>10</sup>

[E]very stakeholder group with a distinct interest in wholesale electric standards should have the opportunity to provide input to and vote in the standards development process, and protect itself from undue harm stemming from this process.

APPA, NRECA and TAPS agree that a structure that provides a meaningful voice in the decisionmaking process to each distinct interest is an essential ingredient to a credible, industry-wide "consensus" process. However, we fear that the NAESB organizational structure, as reflected in its current and difficult-to-change articles of incorporation, creates significant barriers to achievement of that goal. In particular, the NAESB organizational structure (1) poses a serious impediment to creation of a sufficient number of segments to ensure that the consensus process is broadly representative, and (2) denies effective participation to some sector of the industry, by grouping smaller sectors with others that have distinctly different and incompatible business interests.

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<sup>10</sup> IOU Group Pleading at 12-13, as distributed March 11, 2002.

Although the IOU Group Filing does not list particular segments, much of the discussion during these last few months focused on restricting the WEQ to no more than six sectors: Transmission, Generation, Load-Serving Entities, Marketing, End-Users, and Public Interest. While five segments may be said by some to work adequately in the gas industry which (among other things, is less vertically integrated), it will not accommodate definition of segments in a manner that reflects a true cross-section of electricity industry views. Five or six sectors will not capture the diversity of distinct voices in the electric industry given its history, structure, and current stage of evolution. Smaller but distinct voices, such as transmission dependent utilities, public power, and rural electric cooperatives, will likely be drowned out and discouraged from participation.<sup>11</sup>

For example, the voice of municipal and cooperative distribution utilities, whose interests and needs are far different than the distribution function of large vertically-integrated investor-owned utilities, would be muffled by inclusion together in the LSE segment. Similarly, municipal joint action agencies and generation and transmission cooperatives would be completely overwhelmed by both IOU and independent generators if included, without differentiation, in the Generator segment. And small transmission dependent utilities will never be heard over the din of larger entities into whose segments they are swept. The result is a so-called “consensus” process that sheds little light on whether there is anything approaching a true consensus among *all* the varied industry participants that must live with the resulting standard.<sup>12</sup>

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<sup>11</sup> Even on the gas side, the process is such that we understand that the American Public Gas Association and its members do not participate in GISB.

<sup>12</sup> There was discussion during the industry process of use of subsegments although, as reflected in the IOU Group Pleading, no consensus was reached. While properly-defined subsegments would be an essential step in the right direction if the electric industry had to fit its square pegs into the round holes of a five or six segment structure, a far better solution would be to define a larger number of segments to truly reflect

In contrast, the nine well-vetted Wholesale Electric Standards Model (“WESM”) segments that emerged through NERC’s Standing Committee Representation Task Force, and which were adopted by the NERC Board for use in its reliability standards development process (subject to the Board’s continuing supervision), while not perfect, are a far better starting point than the five segment model adopted by NAESB’s predecessor, Gas Industry Standards Board (“GISB”). For example, NERC’s WESM segments includes transmission dependent utilities as a separate segment. We expect the segments to change over time, as trust in the new process is established and as the industry evolves.

A major source of the resistance to expanding the number of segments to more than five or six is the NAESB’s requirement that any one segment has the power to veto a standard when it comes before the “Executive Committee.” Under the NAESB Amended and Restated Certificate of Incorporation,<sup>13</sup> any “segment” can effectively veto adoption of a standard. According to Article V, § 4,

An affirmative vote of at least sixty-seven percent (67%) from each of the applicable Quadrant(s) of the Executive Committee, including an affirmative vote of at least forty percent (40%) from representatives of each Segment within each of the applicable Quadrant(s), which vote must be ratified by a sixty-seven percent (67%) affirmative vote of those members of the applicable Quadrants of the general membership voting, shall be required to adopt, promulgate, amend, revise, modify, interpret or rescind a standard.

This NAESB requirement is reflected in Step 9 of the IOU Group Filing.

Since Executive Committee members are appointed by members of each segment, segment veto rights would allow a minority to veto a standard. To reduce the risk of

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the diversity of interests represented in the electric industry.

standards paralysis, NAESB supporters advocate that the WEQ have a smaller number of segments than the wholesale electric industry currently has. The fact is, the organizational form of market participants – including whether they are large or small, for-profit or customer/community owned, or vertically-integrated, transmission dependent, or otherwise or unbundled – does make a difference. With today’s industry structure, we just can’t be shoe-horned into five segments without abrogation of minority interests. However, while minority interests – such as ours – must be taken into account, a single-segment veto is just plain wrong.

NAESB’s single segment veto stands in marked contrast to the weighted sector voting structure adopted by the NERC Board for its reliability standards development process. *See* NERC Board’s February 20 Resolution on Incorporating Features of the WESM Proposal into the NERC Standards Development Process:<sup>14</sup> “the Board favors the approach recommended in the proposed WESM model that prevents any single segment from blocking the approval of a standard.”

Nor is the NAESB single segment veto requirement one that is easy to change. To the contrary, it is hardwired into the organization absent an affirmative vote of at least 75% of the NAESB board, including an affirmative vote of 40% from the directors representing each segment within each quadrant, which must be ratified by a 90% affirmative vote of the general membership. *See* NAESB Certificate of Incorporation, Article V, §3.

The Commission could move this logjam forward by making clear its expectation that segment definitions must reflect the full range of views encompassed in this industry,

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<sup>13</sup>The NAESB certificate is available at <http://www.naesb.org/pdf/naesbcert.pdf>.

and that it will not countenance the sacrifice of its stated intention to create consensus organization reflecting the *entire* electric industry to NAESB's artificial single segment veto requirement. Such guidance will give NAESB, its current voting membership (90% of whom would need to approve the change), and the electric industry, a clear signal that (1) if NAESB is to function as a single standard setting organization for wholesale business practices and communications protocols, it must promptly change its certificate; and (2) segments should be defined to ensure that *all* distinct views have a meaningful voice in decisionmaking, with any changes to the segment definitions subjected to a well-defined, fair and open process that also is broadly representative. If NAESB cannot accommodate a broadly representative structure without the single segment veto, then a different organizational vehicle must be found for the business standard setting process.

***B. The Commission Should Make Clear that Single Entities Can Vote in Only One Segment***

The IOU Group Pleading does not definitively decide the issue of multiple segment representations for single entities (*i.e.*, vertically-integrated utilities). However, it was a much discussed issue, which could benefit from clear Commission guidance.

The NAESB by-laws, Article 1, § 1.1T, provides for any single entity to vote in multiple segments within a quadrant, so long as the entity meets the requirement of a given segment within a quadrant, joins the segment and quadrant, and pays the dues for each such segment: "A Voting Member may only be a member of multiple Quadrants and Segments if it has paid dues in each such Quadrant and Segment."<sup>15</sup> As we understand it, multiple representation of individual entities is permitted in GISB.

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<sup>14</sup> Available at [ftp://www.nerc.com/pub/sys/all\\_updl/docs/bot/FinalBoardResolutions-WESM2-20-02.pdf](ftp://www.nerc.com/pub/sys/all_updl/docs/bot/FinalBoardResolutions-WESM2-20-02.pdf).

<sup>15</sup> By-laws of NAESB available at <http://www.naesb.org/pdf/naesbbylaws.pdf>.

But the electric industry remains highly vertically integrated, resulting in the prospect that the various segments will be primarily populated by representatives of different divisions of the same companies. For example, vertically-integrated utilities would be eligible (so long as they paid the dues for each segment) to participate in four out of the six segments that have been the focus of much of the discussion these past few months: Transmission, Generation, Load-Serving Entities, and Marketing. Similarly, most independent generators will likewise fit in both the Generation and Marketing segments.<sup>16</sup> And all industry participants have headquarters served at retail, and therefore may potentially attempt to squeeze into the End User segment.<sup>17</sup>

Allowing individual entities to vote in multiple segments creates the real potential that the so-called consensus process will represent nothing more than the consensus of views of divisions of the largest utilities in this country. Nor is this a paranoid vision. It is revealing that among the few entities that have thus far sent NAESB letters of intent to join the wholesale electric quadrant, one large investor-owned utility has specified four segments in which it seeks voting membership: Transmission, Generation, Load-Serving Entities, and Marketing.<sup>18</sup> In our view, agreement to a standard by the various divisions of the largest vertically-integrated utilities hardly demonstrates that the standard in any way reflects a consensus of the *entire* electric industry, as the December 19 Order properly sets as the Commission's goal.

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<sup>16</sup> Subsegment proposals discussed in the industry process featured vertically-integrated utility subsegments in three of the six segments.

<sup>17</sup> We understand that the end user segment of GISB is largely populated by electric utilities.

<sup>18</sup> See North American Energy Standards Board, Companies Intending Joining Quadrants and Sending Letter of Intent, dated 3/14/02, at 4-5, posted at <http://www.naesb.org/naesb.htm>.

We ask the Commission to express its preference for a true industry consensus process where the large players could not drown out all other voices by simply populating most of the segments with divisions that ultimately must reflect the overall corporate objective of the single enterprise.<sup>19</sup> Thus, the Commission should limit the voting participation of any individual entity,<sup>20</sup> including vertically integrated utilities, to a single segment of their choice (whose definition they satisfy). Such clear guidance should assist NAESB in making the necessary changes in its by-laws.<sup>21</sup>

***C. A Professional Independent Staff is Critical to the Effectiveness and Credibility of the Consensus Process as a Voice for the Industry***

NAESB has a skeletal, essentially administrative staff. All the real work is performed by industry “volunteers.”

Reliance on volunteers invites hijack of the consensus process by the largest, most well-funded players, who have the resources to “volunteer” and steer the process in their favor. The absence of an independent, professional staff thus cuts against an open, inclusive process where “resource limited” players can have an effective voice. Instead, a purely “volunteer” process makes more likely a “might makes right” outcome.

Given the complexity of the electric industry and the business standards needed to implement a standard market design, an unbiased, technically proficient professional staff is required to help develop standards, administer the process, and thereby ensure a truly

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<sup>19</sup> While industry participants have argued that divisions of the same enterprise do not necessarily agree with each other, we’ve seen too many times evidence of the obvious fact that they all must answer to the same authority.

<sup>20</sup> We do not seek to limit the participation of vertically-integrated utilities for purposes other than voting.

<sup>21</sup> Under Article V, § 5 of NAESB’s Certificate of Incorporation, changes to its by-laws require an affirmative vote of at least 75% of the NAESB board, including an affirmative vote of at least 40% from directors representing each segment within each quadrant.

open, inclusive, broadly representative process. While we would prefer having such staff report to an independent board (as in the NERC structure), in the NAESB context such staff would report to the stakeholder Executive Committee.

***D. Pay to Play is not an Appropriate Means to Fund What is Intended to be a Broadly Representative Process***

As proposed in the IOU Group Pleading, WEQ should be funded by a fixed annual fee for each participant, with entities participating in more than one segment paying an additional fee for each segment in which they participate. The IOU Group Pleading suggests that some unspecified accommodation of entities that have difficulty contributing the fixed annual payment is contemplated.

A poll tax is no way to encourage the broad participation of all sectors of the industry that is needed to give this process legitimacy. Especially given the already heavy burden placed on small organizations that seek to participate, in terms of travel expense and staff time, imposing a fixed annual fee (such as GISB's \$5000 fee) could well discourage participation by smaller players and consumer groups.<sup>22</sup> If experience on the gas side is any guide, the likely result of the dues structure (as well as the other attributes of the NAESB/GISB process) is that only large well-funded entities will participate.<sup>23</sup>

Nor should we take comfort in the accommodation of the less well funded players hinted at in the IOU Group Pleading. As shown in NAESB's March 8, 2002 press

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<sup>22</sup> GISB's \$5000 fee assumes only a tiny administrative and no professional staff. Inclusion of the professional staff needed to make the consensus process effective and less tilted, however, would likely cause the \$5000 dues to rise, aggravating the dues structure problem.

<sup>23</sup> See Wholesale Gas Quadrant membership list, posted at <http://www.naesb.org/pdf/wgqmembers.pdf>, which includes no public gas system or consumer representative.

release,<sup>24</sup> NAESB has approved until December 31, 2003 “promotional dues” of \$500 a year, available to no more than three organizations (selected through an “open season”) representing residential end users in each of the retail gas and retail electric quadrants. Such a limited, and limited time, “promo” rate hardly ensures broad representation.

If the Commission is serious about creating a truly inclusive, rather than exclusive, process, it should make clear its expectation that “tiered” funding levels should be established.

**V. FERC NEEDS TO CAREFULLY PRESERVE ITS AUTHORITY TO FULLY REVIEW THE RESULTS OF WHATEVER “CONSENSUS” PROCESS IS ADOPTED TO ENSURE CONSISTENCY WITH THE FPA AND THE STANDARD MARKET DESIGN**

In adopting literally hundreds of GISB standards, this Commission has been deferential to GISB, ruling that such deference is consistent with OMB Circular No. A-119, and the National Technology Transfer and Advancement Act of 1995 (“NTT&AA”).<sup>25</sup>

Section 12 of the NTT&AA establishes governmental policy that federal agencies shall use technical standards that are developed or adopted by voluntary consensus standards bodies unless such use is “inconsistent with applicable law or otherwise impractical.” Although ... Senator Rockefeller, a sponsor of the bill, referred to governmental use of standards for procurement purposes, nothing in the final language of the Act limits its applicability to procurement. Congressman Brown, a cosponsor of the Act, in fact, specifically refers to the use of standards for “procurement and *regulatory* purposes.” In addition, § 12 of the NTT&AA was intended to codify

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<sup>24</sup> The press release is available at <http://www.naesb.org/pdf/030802pr.pdf>.

<sup>25</sup> The Commission refers to the National Technology Transfer and Advancement Act of 1995 (“NTT&AA”), Pub L. No 104-113, § 12(d), 110 Stat. 775 (1996), which codified an earlier version of OMB Circular No. 119-A. The currently effective Circular and the Act are consistent.

OMB Circular A-119, which did not limit the policy of using private sector standards to procurement.

*Standards for Business Practices of Interstate Natural Gas Pipelines*, 77 F.E.R.C.

¶ 61,061, at 61,227 (1996) (footnotes omitted). In supporting this position, the Commission stressed the broadly representative consensus process (*id.*):

Even if § 12 of the NTT&AA does not strictly apply here, the Commission is warranted in giving significant weight to the consensus standards. Not only does the industry possess specialized knowledge of business and electronic communication practices, but, since the industry itself has to operate under these standards, the standards should implement practices that are favored by the broadest cross-section of industry members.

At the same time, the Commission has recognized the dangers of relying on an industry process, especially where (as in the NAESB structure), one segment can veto a needed standard:

The Commission is fully aware of the potential for private sector standards committees to inhibit competition, particularly if one interest can block the adoption of a necessary standard. GISB's rules provide that at least two votes from each industry segment are needed to approve a standard. While such a rule is important to ensuring that any approved standard commands a consensus of the industry, the rule also can permit one industry segment voting as a block to defeat a needed standard.

That is precisely why the Commission has not previously, and is not now, delegating to the industry the responsibility to develop the needed standards. The Commission took, and is still taking, an active role in identifying the business areas needing standardization. The Commission provided the industry the opportunity to apply its expertise to craft solutions that command broad agreement throughout the industry, and has appropriately given these consensus solutions great weight. In those areas where additional consideration of modifications or enhancement of the standards may be warranted, the Commission has established a schedule for the industry to

consider refinements. And, the Commission stands ready to resolve issues if necessary.

*Standards for Business Practices of Interstate Natural Gas Pipelines*, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,038, at 30,065-66 (1996) (footnotes omitted).

Particularly in the current state of the electric industry, the Commission must be particularly cautious about deference to a consensus process that is likely to be heavily dominated by the most well-funded participants, who can use the process to undermine the pro-competitive purposes of the standard market design. To ensure that the business standards process does not subvert the FPA's purposes, the Commission must ensure that the process is truly representative by taking the steps APPA, NRECA and TAPS have urged:

- providing for segment definitions that reflect distinctly the industry's diversity;
- eliminating the single segment veto;
- preventing domination by the largest players through multiple segment voting;
- calling for a professional staff; and
- implementing a tiered dues structure.

Further, the Commission should shield from stakeholder control the critical role performed by the independent NERC Board in developing and adopting standards needed to preserve reliability, as articulated above and in the NERC Comments filed today.

However, even if the Commission takes the steps urged above, it will remain difficult for smaller entities to be effectively heard in such a resource-intensive process.

Thus, there remains a serious risk of capture – that the consensus process may not end up reflecting the full range of views.<sup>26</sup>

The Commission therefore needs to carefully preserve its authority and heed its responsibility to closely examine and review the results of the consensus business standards development process for consistency with the Act and the standard market design ultimately adopted by the Commission.

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<sup>26</sup> This risk is especially high if the Commission does not provide the guidance requested by APPA, NRECA and TAPS.

## CONCLUSION

APPA, NRECA and TAPS request the Commission to provide clear directives, consistent with comments set forth above, to facilitate prompt industry agreement to a truly fair and inclusive process for development of business practices and communications protocols needed to implement the Commission's standard market design.

Respectfully Submitted,

### **American Public Power Association**

By /s/ Allen Mosher  
Allen Mosher  
Director, Policy Analysis  
American Public Power Association  
Third Floor  
2301 M Street, N.W.  
Washington, D.C. 20037  
Phone: 202-467-2944  
Fax: 202-467-2992  
Email: [amosher@APPAnet.org](mailto:amosher@APPAnet.org)

### **Transmission Access Policy Study Group**

By /s/ Cynthia S. Bogorad  
Robert C. McDiarmid  
Cynthia S. Bogorad  
Spiegel & McDiarmid  
1350 New York Ave., N.W., Suite 1100  
Washington, D.C. 20005  
Phone: 202-879-4000  
Fax: 202-393-2866  
Email:  
[robert.mcdiarmid@spiegelmcid.com](mailto:robert.mcdiarmid@spiegelmcid.com)  
[cynthia.bogorad@spiegelmcid.com](mailto:cynthia.bogorad@spiegelmcid.com)

### **National Rural Electric Cooperative Association**

By /s/ Wallace F. Tillman  
Wallace F. Tillman, Vice President, Energy  
Policy and General Counsel  
Richard Meyer, Senior Regulatory Counsel  
David L. Mohre, Executive Director,  
Energy & Environmental Division  
Barry R. Lawson, Manager, Power Delivery  
National Rural Electric Cooperative  
Association  
4301 Wilson Boulevard  
Arlington, VA 22203  
Phone: 703-907-5781  
Fax: 703-907-5517  
Email: [barry.lawson@nreca.org](mailto:barry.lawson@nreca.org)  
[dave.mohre@nreca.org](mailto:dave.mohre@nreca.org)

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