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December 29, 2010

Rae McQuade, President  
North American Energy Standards Board  
801 Travis Street, Suite 1675  
Houston, TX 77002

Re: NAESB Managing Committee Resolution on Notational Balloting

Dear Ms McQuade:

We are in receipt of your correspondence to all North American Energy Standards Board's ("NAESB") Board Members dated December 15, 2010 ("December 15 Memorandum"). Further, the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") and PJM Interconnection ("PJM") have been made aware of the agenda and meeting materials posted for the Parliamentary Committee ("PC") meeting scheduled for January 5, 2011. The posted agenda and meeting materials indicate that, at its January 5, 2011 meeting, the PC intends to undertake action on an agenda item entitled "Adoption of the Notational Ballot MC Resolution into the NAESB Operating Practices," which is supported by a word document entitled "*NAESB Managing Committee Resolution on Notational Balloting*" ("the Resolution"). The Midwest ISO and PJM respectfully submit that they have performed an assessment of the Resolution proposed for adoption into the NAESB Operating Procedures and that the results of same indicate several important issues regarding the interpretation/clarification presented in the Resolution including the Resolution potentially being in direct conflict with the current NAESB governance documents. The Midwest ISO and PJM present their assessment of the Resolution as Attachment A to this correspondence and request that these issues be acknowledged, discussed, and resolved by the PC prior to any action being taken on the aforementioned agenda item during the January 5, 2011 PC meeting.

Please do not hesitate to contact either of us using the contact information listed above should you have any questions regarding this correspondence. We would also welcome discussion of these issues during a conference call already proposed between Midwest ISO, PJM, and NAESB on Tuesday January 4, 2011. Obtaining clarification on

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these issues prior to the January 5, 2011 PC meeting will also likely facilitate discussions scheduled for that meeting, making that meeting more productive.

A handwritten signature in black ink, appearing to read "William C. Phillips". The signature is written in a cursive style with a large, prominent "W" and "P".

William C. Phillips

A handwritten signature in blue ink, appearing to read "Andrew L. Ott". The signature is written in a cursive style with a large, prominent "A" and "O".

Andrew L. Ott

## **ATTACHMENT A**

### **ASSESSMENT OF THE NAESB MANAGING COMMITTEE RESOLUTION ON NOTATIONAL BALLOTING FOR COMPLIANCE WITH EXISTING NAESB GOVERNANCE DOCUMENTS**

# ASSESSMENT OF THE NAESB MANAGING COMMITTEE RESOLUTION ON NOTATIONAL BALLOTING FOR COMPLIANCE WITH EXISTING NAESB GOVERNANCE DOCUMENTS

## INTRODUCTION

During the December 9, 2010 North American Energy Standards Board (“NAESB”) Board of Directors (“BOD”) meeting, representatives from the NAESB Managing Committee presented a resolution to the BOD for review and approval, which resolution was the “*NAESB Managing Committee Resolution on Notational Balloting*” (“the Resolution”). At that meeting, considerable discussion was devoted to the objective of the Resolution as well as whether it represented new notational balloting procedures or merely documented in one (1) summary document the existing Executive Committee (“EC”) notational balloting procedures contained in writing within the NAESB Operating Procedures.<sup>1</sup> During the discussions on the Resolution, the representations by representatives from the NAESB Managing Committee to the BOD were that the Resolution only documented the currently existing written NAESB Operating Procedures, did not revise or modify what currently exists in the NAESB governance documents, and merely provided a summary of the EC process for notational voting.<sup>2</sup> Since the December 9, 2010 meeting at which the Resolution was approved by the BOD, the Midwest ISO and PJM have reviewed the NAESB governance documents cited as the source from which the Resolution drew the summary process for notational voting and believe that the Resolution, as presented by the Managing Committee and approved by the BOD, is not only not supported by the references cited by Managing Committee representatives as supporting, but is potentially in direct conflict with the existing NAESB governance documents.

More specifically, the Midwest ISO and PJM assessed the Resolution for compliance with the NAESB governance documents cited as supporting materials, and the results of that assessment indicated the following potential issues:

1. The Default Process Documented In The Resolution Conflicts With The Bylaws Addendum – WEQ Procedures;
2. The Resolution Incorrectly Provides the EC Chair Discretion For Determining When Notational Ballots Will Be Accepted Following Meetings; and
3. The Managing Committee’s Resolution Oversteps That Committee’s Authorization under the Bylaws of NAESB (“NAESB Bylaws”).

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<sup>1</sup> See BOD Transcript at PP 35 – 42.

<sup>2</sup> See BOD Transcript at P 36 – 37; p. 38 (lines 18 – 25); p. 39 (lines 4; 6 - 7; lines 10 - 17; lines 21 – 23); p/ 40 (lines 18 and 25); p. 41 (lines 1 – 2)

Accordingly, the Midwest ISO and PJM respectfully submit that the Managing Committee erred in proposing the Resolution and the BOD erred when approving the Resolution. The Midwest ISO and PJM therefore recommend that, prior to taking action on the aforementioned agenda item to adopt the Resolution into the NAESB Operating Practices, the PC review the assessment provided below and resolve the issues presented herein.

## **BACKGROUND**

The Amended and Restated Certificate of Incorporation of NAESB (“Certificate of Incorporation”) provides a high level reference to the need for established notational voting procedures and requires that such procedures be included in or attached to the NAESB Bylaws. In particular, Article III (Organization and Management), Section 3 of the Certificate of Incorporation provides:

*The Board of Directors and Executive Committee shall further establish procedures for notational voting, attendance by telephone or video conferencing, and determination of quorums. These procedures shall be included in, or attached to, the By-Laws.*

The NAESB Bylaws then document in greater detail the circumstances under which notational ballots can be used for the purpose of voting by EC members. That detail is contained in Article 10 (Executive Committee), Section 10.4 (Meeting) (k) (i - iii) of the NAESB Bylaws, which states as follows:

- (k) Notational voting by EC Members is proper in the following circumstances and pursuant to the following procedures:
  - (i) In lieu of meeting: The EC Chair may request that any vote or action be taken by the EC without a meeting and without unanimous consent, and such action may be taken if approved by the appropriate voting levels specified in Article V of the Certificate. Notice of the EC Chair's request shall be given to all EC Members in the manner specified in Article II of these Bylaws.
  - (ii) During meetings: Notational votes from an EC Member that is not present shall be accepted and counted at an EC meeting with respect to any resolutions circulated in writing in advance of an EC meeting; provided, however, that if substantive changes are made in a resolution at the EC meeting such advance notational votes shall not be counted with respect to that resolution, but the procedures specified in (iii) below should be used.
  - (iii) Following a meeting: The EC shall indicate whether, and if so for how long, notational votes will be accepted after a meeting relating to particular issues voted on at that meeting.

Finally, the Bylaws Addendum – WEQ Procedures, Section 10 (Executive Committee), Subsection 10.9 (EC Meetings) further documents the voting procedures that are specific to the Wholesale Electric Quadrant (“WEQ”) EC, stating:

C *Voting*

- 1 *The WEQ EC shall practice Balanced Voting and record voting results.*
- 2 *Each WEQ EC Member may participate and vote in EC meetings by notational ballot. Every notational ballot shall be executed in writing by the WEQ EC Member or by his or her duly authorized attorney in fact and filed with the Secretary of NAESB. The notational ballot may be mailed, sent via facsimile or sent via electronic mail to the NAESB Office.*
- 3 *Notational voting shall be permitted in accordance with the NAESB Bylaws, Section 10.4 (k) (i-iii).*

**COMPLIANCE ISSUES OF THE RESOLUTION WITH THE CURRENT NAESB GOVERNANCE DOCUMENTS**

**1. *The Default Process Documented In The Resolution Conflicts With The Bylaws Addendum – WEQ Procedures.***

As stated above, the Bylaws Addendum – WEQ Procedures, Section 10 (Executive Committee), Subsection 10.9 (EC Meetings) provides:

- 1 **Each WEQ EC Member may participate and vote in EC meetings by notational ballot.** *Every notational ballot shall be executed in writing by the WEQ EC Member or by his or her duly authorized attorney in fact and filed with the Secretary of NAESB. The notational ballot may be mailed, sent via facsimile or sent via electronic mail to the NAESB Office.*

The Resolution, however, provides that the default process for notational ballots following a meeting is:

- 1) **In a meeting where there are a sufficient number of voting members present (in person or through their alternates) to adopt a standard and the vote is announced on a motion, it is final as to that motion.** *In other words, no one may change their vote after the result is announced. The only way to do anything further is via a motion to reconsider.*
- 2) **In a meeting where there is an insufficient number of voting members present (in person/phone or through alternates) to**

**adopt a standard and a notational ballot is sent out, it goes only to those members who have not previously cast their votes. The votes cast at the meeting are final after that portion of the meeting is concluded and the only issue is counting the votes of the members who have been sent notational ballots.** The standard is adopted or not based upon that vote count. In all other respects the matter is handled in the same fashion as if all were at the meeting.

Pursuant to the Bylaws Addendum, all WEQ EC members have a right to vote notationally even if present in a meeting where a vote is announced. The default process provided in the Resolution appears to place a restriction on a WEQ EC member's right to vote notationally even if present in a meeting as provided by the Bylaws Addendum – WEQ Procedures and, therefore, is in direct conflict with 10.9.c.2 of the Bylaws Addendum – WEQ Procedures.

Further, the default process appears to restrict that EC member's right to participate and vote in the overall process through notational ballot by generally prohibiting notational balloting by an EC member when sufficient voting members are present in a meeting to adopt a standard. The Midwest ISO and PJM consider this a significant restriction on EC member's overall rights in the NAESB process in that it prohibits an EC member from receiving even the right to vote should he or she be unable to attend a particular EC meeting and that meeting should contain enough members to adopt a standard. As the Bylaws Addendum – WEQ Procedures specifically state that each EC member may participate and vote in EC Meetings by notational ballot with no stated exceptions or limitations, the default process as summarized in the Resolution directly conflicts with current NAESB governance documents as discussed above and all but obliterates an EC member's rights to participate and vote in the NAESB process by notational ballot unless he or she is in attendance at every EC meeting or, by happenstance, an EC meeting is not well attended.

Finally, the Midwest ISO and PJM further note that there are no explicit limitations included in or attached to the NAESB Bylaws that would prevent an EC Member who voted in a meeting from submitting a notational ballot during the notational ballot period nor are there any explicit limitations that prohibit an EC member from submitting a vote by notational ballot when an EC Alternate cast a vote in the meeting, thus overriding the EC Alternate vote. Hence, the Resolution should be scrutinized and revised to assure compliance with the current NAESB governance documents and to preserve the rights of EC members to participate and vote notationally should they be unable to attend a particular EC meeting.

**2. *The Resolution Incorrectly Provides the EC Chair Discretion For Determining When Notational Ballots Will Be Accepted Following Meetings.***

The NAESB Bylaws, Article 10 (Executive Committee), Section 10.4 (Meeting) (k) (i - iii) states as follows regarding notational voting following a meeting:

(k) Notational voting by EC Members is proper in the following circumstances and pursuant to the following procedures:

(iii) Following a meeting: **The EC shall indicate whether, and if so for how long, notational votes will be accepted after a meeting relating to particular issues voted on at that meeting.**

The Resolution, however, provides:

*In the case of a complex matter, or for other good cause, **the chair(s) have had and continue to have the discretion to announce that a vote will be taken by notational ballot.** This announcement must precede the vote or be made during the meeting.*

Finally, the NAESB Bylaws, Article I (Definitions), Section 1.1 (Definitions), Subsection G, (EC) provides the definition and use of the term EC in the NAESB Bylaws as:

G. "EC" means **the Executive Committee of NAESB, Inc. (in whole, as a Quadrant EC, or any combination of the Quadrant EC(s)).**

Accordingly, pursuant to Section 10.4.k.iii of the NAESB Bylaws, the EC (as a body) shall indicate whether notational ballots shall be accepted. That the NAESB Bylaws place the discretion for voting by notational ballot following a meeting in the EC as a body and make no reference to EC chair discretion regarding voting by notational ballot is significant when the default process approved in the Resolution is scrutinized for compliance with the current NAESB governance documents. More specifically, a cursory analysis of the NAESB Bylaws reveals that the Resolution is in direct conflict with the NAESB Bylaws as the Bylaws provide such discretion only to the EC as a body while the Resolution usurps the EC's discretion to determine the use and acceptance of notational ballots for voting and attempts to vest said discretion in the individual EC chair(s). The Midwest ISO and PJM recommend that the Resolution be revised to assure compliance with the current NAESB governance documents and to preserve the rights of the EC as a body to determine the use and acceptance of notational ballots for voting.

### ***3. The Managing Committee's Notational Ballots Resolution Oversteps The Committee's Authorization.***

The NAESB Bylaws Article 7 (Board), Section 7.8 (Board Committees), establishes the scope for both the Managing Committee [item (b)] and the Parliamentary Committee [item (c)]. More specifically, the Bylaws state that the Managing Committee "shall have no authority to amend the Certificate or Bylaws" while the Parliamentary Committee is "...to address issues related to corporate governance,

including, but not limited to, the Certificate of Incorporation, the Bylaws and the Operating Procedures.” The Managing Committee has attempted to modify the NAESB Bylaws and Addendum to the Bylaws – WEQ Procedures through the Resolution, an action for which the Managing Committee has no authority under the NAESB Bylaws. The Resolution, as proposed to the BOD for approval and for adoption by the PC, does not respect either the organizational structure established by the NAESB Bylaws or the responsibilities and obligations of the PC under the NAESB Bylaws. The Midwest ISO and PJM recommend that the PC not act on the agenda item to adopt the Resolution and directly develop detailed, specific procedures for notational voting that comply with the current NAESB governance documents and respect the rights of the EC members to participate and vote in meetings by notational ballot.

## **CONCLUSION**

The Midwest ISO and PJM recommend that the motion approved by the BOD be rescinded at the next scheduled BOD meeting. The PC, on January 5, 2011, should take no action to adopt the Resolution because it is in direct conflict with the existing NAESB governance documents. Instead, the PC should develop detailed, specific procedures for notational voting that comply with the current NAESB governance documents or instead develop proposed amendments to the Bylaws for consideration by the BOD.