

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Algonquin Gas Transmission, LLC	)	Docket Nos. RP13-502-000
Big Sandy Pipeline, LLC	)	RP13-503-000
Bobcat Gas Storage	)	RP13-504-000
East Tennessee Natural Gas, LLC	)	RP13-505-000
Egan Hub Storage, LLC	)	RP13-506-000
Gulfstream Natural Gas System, LLC	)	RP13-507-000
Maritimes & Northeast Pipeline, LLC	)	RP13-508-000
Iroquois Gas Transmission System, LP	)	RP13-509-000
Ozark Gas Transmission, LLC	)	RP13-510-000
Saltville Gas Storage Company, LLC	)	RP13-512-000
Steckman Ridge, LP	)	RP13-513-000
Texas Eastern Transmission, LP	)	RP13-514-000
Southeast Supply Header, LLC	)	RP13-515-000
	)	(Not Consolidated)

PROTEST OF THE AMERICAN PUBLIC GAS ASSOCIATION

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”)¹ and the Commission’s Combined Notice of Filing issued February 1, 2013, the American Public Gas Association (“APGA”) hereby submits the following protest in each of the above-captioned, non-consolidated proceedings.

I. BACKGROUND

APGA is the national, non-profit association of publicly-owned natural gas distribution systems, with some 700 members in 36 states. Overall, there are some 950 publicly-owned systems in the United States. Publicly-owned gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that

¹ 18 C.F.R. §385.211 (2012).

have natural gas distribution facilities. APGA members purchase interstate natural gas transportation services, usually as captive customers of a single interstate pipeline, at rates and under terms and conditions that are regulated by the Federal Energy Regulatory Commission (“FERC”), from virtually every major interstate pipeline in the country, including many of those listed in the caption to this pleading.

On January 31, 2013, thirteen FERC-jurisdictional natural gas transportation service providers owned by Spectra Energy Corp² filed to amend their respective tariffs in the above-captioned non-consolidated proceedings to include new waiver language explicitly authorizing the pipelines to reproduce sections of the latest version of the North American Energy Standards Board (“NAESB”) Wholesale Gas Quadrant (“WGQ”) Business Practices and Electronic Communications Standards (“NAESB WGQ Version 2.0”). The Spectra Pipelines each quote certain NAESB WGQ Version 2.0 standards verbatim in their tariffs; other NAESB standards are incorporated by reference. The Spectra Pipelines each propose to add the following waiver language to their respective tariffs prior to a list of NAESB WGQ Version 2.0 standards that are quoted verbatim in their tariffs:

NAESB has granted to [relevant Spectra Pipeline] a limited waiver to allow [relevant Spectra Pipeline] to reproduce the following Business Practices and Electronic Communications Standards, NAESB WGQ Version 2.0, that are protected by NAESB’s federal copyright. ©2012 NAESB, all rights reserved. *Reproduction of these standards in any form is strictly prohibited without first obtaining permission from NAESB.* [Emphasis added.]

The Spectra Pipelines each noted in their respective tariff filings that they do not believe that NAESB’s prior consent or the proposed waivers is necessary in order for the Spectra

² Algonquin Gas Transmission, LLC; Big Sandy Pipeline, LLC; Bobcat Gas Storage; East Tennessee Natural Gas, LLC; Egan Hub Storage, LLC; Gulfstream Natural Gas System, LLC; Maritimes & Northeast Pipeline, LLC; Iroquois Gas Transmission System, LP; Ozark Gas Transmission, LLC; Saltville Gas Storage Company, LLC; Steckman Ridge, LP; Texas Eastern Transmission, LP; Southeast Supply Header, LLC (collectively “Spectra Pipelines”).

Pipelines to reproduce NAESB WGQ Version 2.0 standards in their tariffs. Instead, the Spectra Pipelines proposed the waivers in order to avoid uncertainty regarding the pipelines' right to quote NAESB standards verbatim in their tariffs.

NAESB previously submitted a report to the Commission on November 20, 2012,³ in which it set forth its interpretation of the rights it maintains over the copyrighted standards that it produces. In the November 20 Report, NAESB stated:

Any entity, member or non-member, wishing to quote verbatim language from copyrighted standards that are not the subject of a previous agreement between the Commission and NAESB must first obtain express permission of NAESB and must reference NAESB's consent to the request in the compliance filing and/or tariff, as well as, where applicable, the transmittal letter.⁴

On December 10, 2012, Spectra Energy, LLC sent a letter on behalf of the Spectra Pipelines seeking NAESB's express consent to quote certain NAESB WGQ Version 2.0 standards in their tariffs, but making clear that Spectra does not believe that such consent is necessary before quoting standards verbatim in a tariff.⁵ NAESB provided its express consent to the Spectra Pipelines to quote certain NAESB WGQ Standards verbatim in their respective tariffs in a letter dated December 14, 2012.⁶ The December 14 Letter also required the Spectra Pipelines to add the waiver language proposed in the above-captioned proceedings. NAESB's December 14 claimed that:

This language, in addition to protecting NAESB's work products, *is critical in protecting the pipeline's customers* and other interested parties

³ *Report of the North American Energy Standards Board*, Docket Nos. RM05-5-000 and RM96-1-000 ("November 20 Report").

⁴ November 20 Report at 4-5.

⁵ Spectra Energy's letter to NAESB is included as Appendix B to each tariff filing by the Spectra Pipelines in the above-captioned proceedings (December 10 Letter").

⁶ NAESB's letter to Spectra Energy is included as Appendix C to each tariff filing by the Spectra Pipelines in the above-captioned proceedings ("December 14 Letter").

who might otherwise inadvertently commit copyright violations by reusing the language without authority to do so. [Emphasis added.]

NAESB's claim that customers may violate copyright law when they quote tariff language that was adapted verbatim from a NAESB standard raises serious concerns for APGA and its members, many of whom take service on Spectra Pipelines (and other similarly situated pipelines). APGA believes it is important for the Commission to set the record straight on this matter so that customers are not intimidated by the threat of copyright law infringement from exercising their right to quote NAESB standards verbatim either in formal pleadings or in informal correspondence with consultants, lawyers, asset managers, and the like regarding such standards.

II. PROTEST

Rather than "protecting the pipeline's customers," as claimed by NAESB in the language quoted above, the proposed waiver language, which requires NAESB permission for a customer to quote a NAESB standard verbatim, would have the contrary effect. The proposed requirement that parties first obtain NAESB's permission before reproducing a tariff section that quotes or is incorporated from a NAESB standard would have the practical effect of requiring customers and their attorneys to obtain NAESB's permission before discussing certain tariff provisions in informal written exchanges or in formal pleadings.

A pipeline customer should be able to discuss, in writing (including quoting verbatim), tariff provisions with counsel and consultants and quote tariff sections in pleadings with the Commission without getting formal permission from NAESB. Such a waiver requirement, which is inconsistent with the "fair use" doctrine in copyright law (as discussed below), would have a chilling effect on both attorney-client discussions and on airing grievances before this

Commission and the courts.⁷ If the Commission accepts the Spectra Pipelines’ proposal to add the proposed copyright waiver language in each of the above-captioned proceedings, it should do so with the express caveat that such language does not inhibit full and free exchanges by pipeline customers with employees or third party consultants and/or with the Commission and the courts. The Commission should clarify that the mandatory requirement to “first obtain[] permission from NAESB” before reproducing NAESB provisions does not restrict a customer’s ability to reproduce verbatim a NAESB standard, whether that standard is copied directly into the tariff or incorporated into the tariff by reference, in the context of formal pleadings or in the context of informal communications with employees or third persons retained to assist the customers in understanding the meaning of such provisions.

The proposed waiver requirement is contrary to the “fair use”⁸ doctrine. The most likely scenario in which a customer would reproduce a tariff provision that also happens to be a NAESB Standard (whether copied verbatim in the tariff or incorporated by reference) would be in a protest or complaint challenging or seeking enforcement or clarification of that tariff section either to this Commission or perhaps a court. Such a scenario is clearly covered by the fair use exception to copyright. For example, the 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* cites illustrative activities that courts have regarded as fair use, including: “quotation of excerpts in a review or criticism for purposes of illustration

⁷ This issue was not addressed in the Commission’s Final Rule in Order No. 676-E, *Standards for Business and Communication Protocols for Public Utilities*, 129 FERC ¶ 61,162 (2009).

⁸ Fair use of an otherwise copyrighted work is not an infringement. The factors to be considered in determining fair use “include - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107.

or comment” and “reproduction of a work in legislative or judicial proceedings or reports.”⁹

As an exception to copyright, fair use would excuse a pipeline customer from obtaining NAESB’s prior written consent regardless of any waiver language in the quoted tariff. Also, as a practical matter, there is often limited time to respond to proposed pipeline tariff changes. Customers should not have to worry about identifying which tariff subsections may be verbatim quotes of NAESB standards and obtaining NAESB’s permission to repeat those standards prior to protesting a proposed pipeline tariff change.

The other likely scenarios where a customer may have reason to repeat a tariff section verbatim include consulting with an attorney, asset manager, or other advisor regarding the meaning of a provision or ways to ensure compliance. These activities amount to quoting for the personal understanding of the pipeline customer, which is a non-commercial, *de minimis* use of what would amount to a limited portion or portions of the NAESB WGQ Version 2.0 standards with no effect on the market for or value of those standards.¹⁰ Any such quoting of pipeline tariff provisions that happened to have been adopted from NAESB standards would satisfy the Copy Right Act’s four factor test for determining fair use.

NAESB’s proposed waiver language (replicated in the filings of the Spectra Pipelines) gives the inaccurate impression that customers and other interested parties cannot seek redress with this Commission regarding the specific terms of currently effective pipeline tariff provisions

⁹ See, e.g., *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406-07 (9th Cir. 1982) (copying of allegedly obscene film to be used as evidence in a nuisance abatement action was “fair use”); 3 Nimmer on Copyright § 13.05[D] at 13-91 (1991) (“works are customarily reproduced in various types of judicial proceedings [. . .] and it seems inconceivable that any court would hold such reproduction to constitute infringement either by the government or by the individual parties responsible for offering the work in evidence”). Even NEASB admits that the fair use doctrine allows a pipeline customer to quote an otherwise protected standard in a protest or complaint to the Commission. See November 20 Report at 5.

¹⁰ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (“a use that has no demonstrable effect upon the market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create”).

or go about the ordinary business of discussing with third parties their rights and obligations under pipeline tariff provisions, if those discussions happen to involve verbatim quotes of NAESB standards, without first obtaining the express consent of NAESB. It is important that the Commission clarify this matter so that all parties know their rights and obligations well ahead of time, rather than scrambling around at the eleventh hour to determine what copyright laws may/may not apply to a communication or pleading in which a NAESB standard is reproduced.

III. CONCLUSION

WHEREFORE, based on the foregoing, APGA respectfully requests that the Commission make clear that the waiver language proposed by the Spectra Pipelines in each of the above-captioned proceedings does not inhibit a customer's right to quote verbatim NAESB provisions that are set forth directly in a pipeline's tariff or incorporated therein by reference either in formal pleadings or in informal correspondence with employees or third persons retained to assist the customer regarding the NAESB provision in question.

Respectfully submitted,

AMERICAN PUBLIC GAS ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each of the parties in these proceedings in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C., this 12th day of February 2013.

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