

143 FERC ¶ 61,230
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Texas Eastern Transmission, LP

Docket No. RP13-911-000

ORDER ON TARIFF FILING

(Issued June 12, 2013)

1. On May 13, 2013, Texas Eastern Transmission, LP (Texas Eastern) filed a tariff record¹ modifying section 27 of the General Terms and Conditions (GT&C) of its tariff to reflect the revised Copyright Policy established by the North American Energy Standards Board (NAESB).² Texas Eastern requests that the tariff record listed in Footnote No. 1 be accepted effective June 13, 2013. As discussed below, Texas Eastern's proposed tariff record is accepted effective June 13, 2013.

I. Background and Details of Filing

2. Texas Eastern reproduces certain NAESB standards in full in its tariff. On January 31, 2013 (January 31 Filing), Texas Eastern, along with other pipelines in the

¹ Texas Eastern Transmission, LP, FERC NGA Gas Tariff, Texas Eastern Database 1, [27., North American Energy Standards Board, 4.0.0.](#)

² NAESB's Copyright Policy is reflected in two documents – the NAESB Copyright Procedure Regarding Member and Purchaser Self-Executing Waiver and the Irrevocable, Self-Executing, Limited Waiver of NAESB Copyright for NAESB Members and Non-Member Purchasers of NAESB Standards – which were provided to the Commission in a report submitted by NAESB on April 18, 2013, in Docket Nos. RM96-1 and RM05-5.

same corporate group, filed tariff revisions to reflect the waiver NAESB granted to Texas Eastern of the right to reproduce some of the NAESB standards in its tariff. By order issued on March 1, 2013³ the Commission accepted the January 31 Filing to modify its tariff to reflect the waiver issued to Texas Eastern by NAESB.

3. In this filing, Texas Eastern proposes modifying its tariff to reflect further revisions to the NAESB Copyright Policy regarding self-executing waivers. The tariff provision provides: “Pipeline may publish in its tariff, compliance filings, in communications with customers or stakeholders in conducting day to day business or in communications with regulatory agencies some or all of the language contained in NAESB standards protected by copyright, provided that Pipeline includes appropriate citations in the submission.” Texas Eastern requests that the Commission approve the language for inclusion in its tariff effective June 13, 2013.

II. Public Notice, Comments and Intervention

4. Public notice of the filing was issued on May 14, 2013. Interventions and protests were due on or before May 28, 2013. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2012)), all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On May 28, 2013, Municipal Defense Group⁴ (MDG) filed a motion to intervene and comments.

A more detailed discussion of MDG’s comments, as well as the Commission’s determination of the issues raised, are set forth below.

³ *Algonquin Gas Transmission, LLC., et al.*, 142 FERC ¶ 61,164 (2013).

⁴ MDG consists of the following distributor-customers of Texas Eastern Transmission, LP: Borough of Chambersburg, Pennsylvania; Batesville, Indiana; Cairo Public Utility Company, an Illinois not-for-profit corporation; Gloster, Mississippi; Harrisburg, Arkansas; Horton Highway Utility District, Tennessee; Lawrenceburg, Tennessee; Loretto, Tennessee; Middleborough, Massachusetts, Municipal Gas and Electric Department; Norwich, Connecticut, Department of Public Utilities; Smyrna, Tennessee; and Utica, Mississippi.

III. Discussion

A. NAESB's Copyright Policy

1. Comments

5. MDG states that while it supports Texas Eastern's proposed tariff changes it remains concerned that the copyright waiver only applies to NAESB members and non-member purchasers of NAESB standards. MDG states that a pipeline's customer should not be hindered by copyright law for reproducing a section within a pipeline's tariff that was originated from a NAESB standard. MDG argues that a shipper should be able to quote a tariff provision when it petitions the Commission for relief without a waiver from NAESB, regardless of whether the shipper is a member or non-member purchaser of NAESB standards. MDG asserts that restricting a pipeline customer's ability to quote Commission-approved tariff language infringes upon that customer's rights under sections 4 and 5 of the Natural Gas Act, and that it is unduly discriminatory to restrict the ability of certain pipeline customers to quote certain provisions of the Commission approved pipeline tariff to which they are subject.

6. MDG contends that the Commission should take this opportunity to clarify that a pipeline's customer may quote the exact language of a Commission-approved pipeline tariff provision that was adopted from a NAESB standard in a filing at the Commission regardless of whether that customer is a member or non-member purchaser of NAESB standards, otherwise pays NAESB to access its standards, or seeks a waiver from NAESB.

2. Commission Determination

7. First, MDG's comment does not reflect the NAESB policy regarding use of standards by non-members and non-purchasers. As NAESB explained in its filing with the Commission:

The unilateral grant of the waiver did not alter NAESB's current practice of providing access to copyright protected material to non-members who have not purchased the material, nor does it limit any fair use of the material.... As previously addressed, requests for copyright waivers by non-member entities who have not purchased copyright protected

material will be reviewed and approved on a case by case basis.⁵

8. Second, as the Commission has explained in prior orders,⁶ its incorporation by reference of the NAESB standards is consistent with the requirements of the National Technology and Transfer Act⁷ as well as the Administrative Procedure Act.⁸ Under these requirements, the Commission is obligated to respect the copyright of the standards organization,⁹ which helps defray the standards organization's administrative costs.¹⁰

⁵ NAESB Copyright Procedure Regarding Member and Purchaser Self-Executing Waiver, Docket Nos. RM05-5-000 and RM96-1-000 (April 18, 2013).

⁶ See, e.g., the Order No. 587 series of orders which began with the Commission's issuance of *Standards for Business Practices of Interstate Natural Gas Pipelines*, Order No. 587, FERC Stats. & Regs. ¶ 31,038 (1996). The most recent order in this series is Order No. 587-V, issued on July 19, 2012, wherein the Commission incorporated by reference the Version 2.0 WGQ Business Practice Standards. See *Standards for Business Practices for Interstate Natural Gas Pipelines*, Order No. 587-V, FERC Stats. & Regs. ¶ 31,332 (cross-referenced at 140 FERC ¶ 61,036 (2012)) (Order No. 587-V).

⁷ Pub L. No. 104-113, section 12(d), 110 Stat. 775 (1996), 15 U.S.C. § 272 note (1997). This act requires federal agencies to use technical standards developed by voluntary consensus standards organizations, like NAESB, as means to carry out policy objectives or activities.

⁸ 5 U.S.C. § 552 (a)(1).

⁹ See OMB Circular No. A-119 (Revised February 10, 1998), at 6J, <http://www.whitehouse.gov/omb/rewrite/circulars/a119/a119.html> ("if a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations"), 28 U.S.C. § 1498 (federal government may be liable for copyright infringement). Other government agencies similarly have denied requests to publish copies of privately developed standards. *Updating OSHA Standards Based on National Consensus Standards*, 74 FR 46350-46361 (September 9, 2009) ("OSHA notes that copyright laws protect national consensus standards"); *Airworthiness Directives; Airbus Model A300 Airplanes*, 72 FR 6923 (Feb. 14, 2007) (finding that incorporated by reference materials "do not lose their copyright protection"). Texas Eastern's authorized reproduction of the standards does not void or otherwise invalidate the NAESB copyright as applied to others. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001) (waiver of copyright "occurs only if there is an intent by the copyright proprietor to surrender rights in his work").

The Commission therefore cannot create exemptions from the application of copyright laws, nor is the Commission the appropriate forum to determine the scope of fair use under the copyright laws¹¹ as it applies to specific uses of the standards reproduced in Texas Eastern's tariff.

The Commission orders:

The tariff record listed in Footnote No. 1 is accepted effective June 13, 2013.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰ See *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-E, FERC Stats. & Regs. ¶ 31,299, at PP 115-121 (2009) (discussing Commission's obligation to preserve copyright); *Trans-Union Interstate Pipeline LP*, 141 FERC ¶ 61,167, at P 55 (2012) ("language of the NAESB WGQ Standards is copyrighted and the Commission cannot require a pipeline to reproduce the Standards in its tariff").

¹¹ 17 U.S.C. § 107 ("the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright").