

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

North American Electric Reliability Council) Docket No. RR06-1-003
North American Electric Reliability Corporation)

JOINT COMMENTS OF THE ISO/RTO COUNCIL

Pursuant to the notice of filing issued by the Commission in the above-captioned proceeding on October 24, 2006, the ISO/RTO Council (“IRC”)¹ respectfully submits these joint comments concerning the “Compliance Filing of the North American Electric Reliability Council and the North American Electric Reliability Corporation Addressing Non-Governance Issues” that was submitted in the proceeding on October 18, 2006 (“Non-Governance Compliance Filing”).

¹ The IRC was formed by the nine functioning Independent System Operators (“ISOs”) and Regional Transmission Organizations (“RTOs”) in North America in April 2003. It is comprised of The Independent System Operator operating as the Alberta Electric System Operator (“AESO”), California Independent System Operator, Inc. (“CAISO”), Electric Reliability Council of Texas (“ERCOT”), the Independent Electricity System Operator of Ontario (“IESO”), ISO New England, Inc. (“ISO-NE”), Midwest Independent Transmission System Operator, Inc. (“MISO”), New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, L.L.C. (“PJM”), and Southwest Power Pool (“SPP”).

The AESO and IESO are not subject to this Commission’s jurisdiction. While the AESO and IESO concur with these joint comments of the IRC, their concurrence should not be construed as agreement or acknowledgement that they are subject to this Commission’s jurisdiction.

The IRC’s mission is to work collaboratively to develop effective processes, tools, and standard methods for improving competitive electricity markets across North America. In fulfilling this mission, it is the IRC’s goal to provide a perspective that balances reliability standards with market practices so that each complements the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers.

I. BACKGROUND AND SUMMARY OF JOINT COMMENTS

In its Order Nos. 672 and 672-A,² the Commission established the criteria that an applicant must satisfy to qualify as the single Electric Reliability Organization (“ERO”) for the United States under Section 215 of the Federal Power Act (“FPA”). The Commission received one application for certification as the ERO, submitted in the above-captioned proceeding by the North American Electric Reliability Council, on behalf of its wholly-owned subsidiary, the North American Electric Reliability Corporation (collectively, “NERC”).

On July 20, 2006, the Commission issued an order in this proceeding that certified NERC as the ERO for the United States.³ As relevant here, the Commission stated that although it “concludes that NERC generally satisfies the criteria to become the ERO responsible for developing and enforcing mandatory Reliability Standards for the United States, as discussed in the body of this order, we direct NERC to provide additional information and make specific revisions to its Rules in a compliance filing to be filed within 90 days of the date of this order.”⁴ NERC submitted the Non-Governance Compliance Filing to comply with all of the directives in the July 20 Order other than

² *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

³ *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 (2006) (“July 20 Order”).

⁴ July 20 Order at P 3. A Reliability Standard is defined under Commission regulations implemented pursuant to Order Nos. 672 and 672-A as “a requirement approved by the Commission under section 215 of the Federal Power Act, to provide for Reliable Operation of the Bulk-Power System.” 18 C.F.R. § 39.1 (2006). Reliable Operation is defined as “operating the elements of the Bulk-Power System within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, . . . or unanticipated failure of system elements.” *Id.* The Bulk-Power System is defined as “facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof), and electric energy from generating facilities needed to maintain transmission system reliability.” *Id.*

items related to NERC governance and certain items related to the *pro forma* delegation agreement and the NERC-regional entity compliance monitoring and enforcement program.⁵

The IRC takes no issue with most of the responses to the Commission's directives that NERC provided in the Non-Governance Compliance Filing. However, the IRC submits that a few of the items in the Non-Governance Compliance Filing require modification or further explanation. Specifically, the IRC believes the Commission should require NERC to supplement or modify its filing as follows:

- The Commission should require NERC to employ the NERC Standards Development Process to address all issues related to defining and maintaining an adequate level of reliability.
- If the Commission accepts NERC's elimination of the appeals process for the reliability readiness program, the Commission should direct NERC to provide an evaluated entity the ability to provide early input concerning the release of information that NERC proposes to include in an evaluation report. The Commission should also direct that any findings relating to compliance requirements shall not be included in a final evaluation report, but should instead be reported and disclosed separately from the readiness evaluation report pursuant to the NERC and regional entity compliance program.
- The Commission should require NERC to provide additional explanation as to the factors it will use in determining which penalty amount, within the range of penalty amounts from \$20,000 to \$1 million, it will apply for violations of the requirements of NERC Reliability Standards, and should direct NERC to resolve in a timely manner the issue of what types of behavior warrant each of the penalty amounts within the range.⁶
- The Commission should require NERC to modify its revised Rules of Procedure concerning confidential information to provide express protection for information that is accorded confidential treatment by the Commission and to specify that a

⁵ Non-Governance Compliance Filing at 1. On September 18, 2006, NERC submitted in this proceeding a compliance filing to modify its governance structure in certain respects.

⁶ The NERC penalty matrix, which is discussed in Section II.C, below, has not been approved in or adopted by either the province of Alberta or the province of Ontario and therefore is not applicable or enforceable in those Canadian jurisdictions.

request for information that is deemed confidential under other rules approved by the Commission must comply with those rules.⁷

- The Commission should find that NERC has complied with the directive to adopt the definitions of terms adopted in Order No. 672 and should recognize the difference between the bulk power system (as defined in Order No. 672) and the bulk electric system (as defined by NERC), at least on “day one” of ERO operations.

II. JOINT COMMENTS

A. **The Commission Should Direct NERC to Employ the NERC Standards Development Process to Address All Issues Related to Defining and Ensuring an Adequate Level of Reliability.**

In the July 20 Order, the Commission directed NERC to “consider and propose methods for ensuring that Reliability Standards provide for an adequate level of reliability and defining ‘an adequate level of reliability.’”⁸ In the Non-Governance Compliance Filing, NERC states, *inter alia*, that:

... developing acceptable metrics for adequate reliability will require an extended and fully vetted process involving stakeholders, including end users and the states. NERC proposes to initiate a stakeholder process to refine the definition of adequate reliability, including any appropriate metrics, and will report to the Commission on its progress as part of its one-year compliance filing on measures to enhance the reliability of the bulk power system. In the interim, the determination of whether a standard or an action of the ERO, a regional entity, or a bulk power system owner, operator, or user achieves an adequate level of reliability is one that must be made . . . through the NERC standards development process.⁹

The IRC agrees with NERC’s general statement that all determinations concerning the definition of “adequate reliability,” including metrics through which the

⁷ The AESO and IESO are subject to obligations imposed on them by authoritative documentation applicable in their respective jurisdictions of Alberta and Ontario, which includes confidentiality obligations. *See also infra* Section II.D.

⁸ July 20 Order at P 240.

⁹ Non-Governance Compliance Filing at 12.

adequacy of reliability would be measured, must be developed through an open, fully vetted stakeholder process. The IRC is concerned, however, about NERC's lack of precision regarding the specific process to be employed. The IRC believes that all such determinations should be made through the NERC Standards Development Process, which is described in Attachment 3 – Appendix 3A to the Non-Governance Compliance Filing. That is the only process that satisfies NERC's goal of employing an extended and fully vetted process that is open to all stakeholders, end users, and regulators. Therefore, the Commission should direct NERC to employ the open and inclusive NERC Standards Development Process to address all issues concerning adequate reliability, including the definition of an adequate level of reliability and methods for ensuring that Reliability Standards provide for an adequate level of reliability.

B. If the Commission Accepts NERC's Proposed Elimination of the Appeals Process for the Reliability Readiness Program, the Commission Should Direct NERC to Provide an Evaluated Entity the Ability to Provide Early Input Concerning the Release of Information to Be Contained in an Evaluation Report. The Commission Should Also Require NERC to Ensure that Evaluation Reports Do Not Circumvent or Undermine NERC's Compliance Process.

In the July 20 Order, the Commission noted some parties' concerns about differences between the appeals process set forth in NERC's reliability readiness program and the appeals processes applicable to other aspects of NERC's enforcement program. The Commission directed NERC to explain why there is a need for different appeal procedures and, in particular, why arbitration is needed with regard to NERC's reliability readiness reviews.¹⁰ In the Non-Governance Compliance Filing, NERC does not attempt to justify the different appeals processes it initially proposed. Instead, NERC proposes to

¹⁰ July 20 Order at P 335.

eliminate altogether the appeals process for the reliability readiness program (which it would rename the “Reliability Readiness Evaluation and Improvement Program”). NERC asserts that an appeals process, of any form, serves no useful purpose for the reliability readiness evaluation program, because implementation of any recommendations by an evaluated entity is not compulsory. NERC also states that: (i) no entity has chosen to employ the appeals process in the program’s three-year history; and (ii) entities will still have the right to include a statement of their position with the release of a final evaluation report issued pursuant to the program.¹¹

The IRC is concerned that NERC’s elimination of the appeals process produces a gap whereby an evaluated entity has no means whatsoever to appeal an adverse evaluation report. The appeals process that NERC proposes to eliminate provided a means, after a final evaluation report was issued, for the evaluated entity to seek adjudication of a dispute concerning the findings or recommendations contained in the final evaluation report.¹² The right to disregard the recommendations in an evaluation report is not a sufficient substitute for the ability to correct errors in the report, because entities will be understandably reluctant to resist recommendations that have NERC’s imprimatur. If the Commission accepts the proposed elimination of the appeals process for the reliability readiness evaluation program, it should direct NERC to give an evaluated entity the ability to provide early input concerning the release of information that NERC proposes to include in the evaluation report, to ensure that there is agreement as to the information to be publicly disclosed in the report. NERC’s revised Rules of

¹¹ Non-Governance Compliance Filing at 26.

¹² See Non-Governance Compliance Filing at Attachment 2, p. 71 (containing black-lined text showing deleted Section 707(6) of NERC’s revised Rules of Procedure).

Procedure already provide some means for evaluated entities to review and seek to correct the information to be contained in the final evaluation report, but additional procedures are required if there is to be no avenue for review of the report.¹³

The Commission should also direct NERC to ensure that the reliability readiness evaluation program reports do not circumvent or undermine NERC's and the regional entities' compliance programs. As explained in NERC's revised Rules of Procedure, the purpose of NERC's readiness evaluations is to "ensure that operators of the bulk power system have the facilities, tools, processes, and procedures in place to operate reliably under future conditions."¹⁴ That positive and worthy goal would not be furthered by the publication of final evaluation reports that address compliance issues and whose conclusions are not subject to review or to the due process rights embodied in the compliance programs of NERC and the applicable regional entity. The Commission should direct that any findings relating to compliance requirements shall not be included in a final evaluation report, but should instead be reported separately from the readiness evaluation report pursuant to the NERC and regional entity compliance program, where the evaluated entity will be ensured due process, including rights of appeal. If and when such findings are confirmed, they can then be disclosed through the procedures specified for the compliance program, rather than through the evaluation report.

¹³ See Non-Governance Compliance Filing at Attachment 1, p. 59 (Sections 707(3) and 704(4) of NERC's revised Rules of Procedure).

¹⁴ Non-Governance Compliance Filing at Attachment 1, p. 55 (Section 701 of NERC's revised Rules of Procedure).

C. The Commission Should Direct NERC to Provide More Guidance As to the Factors It Will Use in Determining Which Penalty Amount, within the Range of Penalty Amounts from \$20,000 to \$1 Million, It Will Apply for Violation of the Requirements of NERC Reliability Standards, and Should Direct NERC to Resolve in a Timely Manner the Issue of What Types of Behavior Will Warrant Each of the Penalty Amounts Within the Range.

In the July 20 Order, the Commission stated that it generally approved NERC's proposed Sanction Guidelines with respect to penalties for violation of the requirements of NERC Reliability Standards, but directed NERC to include its proposed penalty amount of \$1 million per violation, per day in its Base Penalty Amount Table, and to change or provide additional explanations with regard to a number of specific aspects of its penalty proposal.¹⁵ In the Non-Governance Compliance Filing, NERC includes the \$1 million penalty in the Base Penalty Amount Table and provides certain explanations.¹⁶

The IRC agrees with the way in which NERC has incorporated the \$1 million penalty into the scheme of the Base Penalty Amount Table. That scheme involves comparing the Violation Risk Factor (lower, medium, or high) of a violation with the Violation Severity Level (lower, moderate, high, or severe) of a violation to determine a range of possible penalty amounts. It is appropriate for NERC to consider all of the important variables in determining how large a penalty to apply, especially when the maximum penalty is as high as \$1 million.

However, NERC has not provided an adequate explanation regarding how it will determine whether to apply the \$1 million penalty, or some lesser sanction. The Base Penalty Amount Table indicates that for a high Violation Risk Factor and a severe

¹⁵ July 20 Order at P 437.

¹⁶ Non-Governance Compliance Filing at 39-40.

Violation Severity Level, the penalty amount can range from \$20,000 to \$1 million.¹⁷

There is no explanation as to how NERC would select a value within this broad range.

The Commission should direct NERC to explain which factors it will consider, and how it will take them into account, in determining whether it will apply a penalty of \$20,000 or the maximum penalty, which is fifty times that amount, or some value in between.

The Commission should also direct NERC to make it a priority to resolve in a timely manner the issue of what types of behavior warrant each of the penalty amounts within the range. The IRC believes that the \$1 million penalty should be reserved for the most serious violations and that NERC should describe the types of violations that would warrant the application of such a penalty as well as penalties of lesser amounts, down to the \$20,000 minimum.

D. The Commission Should Direct NERC to Modify Its Revised Rules of Procedure Concerning Confidential Information to Provide Express Protection for Information that is Accorded Confidential Treatment by the Commission and to Specify that a Request for Information that is Deemed Confidential Under Other Rules Approved by the Commission Must Comply with Those Rules.

In the July 20 Order, the Commission expressed the concern that NERC provided insufficient detail on how it will facilitate access to the information that the Commission will need to fulfill its reliability oversight and adequacy assessment roles under the FPA. The Commission directed NERC to modify its Rules of Procedure to “acknowledge the Commission’s authority, in general, to have timely access to information and records within the time frame provided by the Commission in accordance with our regulations implementing sections 215 and 301(b) of the FPA.”¹⁸ In the Non-Governance

¹⁷ Non-Governance Compliance Filing at Attachment 8 – Appendix 4B, p. 17.

¹⁸ July 20 Order at P 641.

Compliance Filing, NERC simply states that “[n]ew Section 1505 added to the Rules of Procedure addresses this issue.”¹⁹

NERC has proposed new Section 1500 of the revised Rules of Procedure (containing Sections 1501-1506) to address how NERC and regional entities will keep information confidential.²⁰ The IRC has two related concerns regarding these provisions.

First, NERC’s proposed Section 1500 fails to acknowledge that the Commission has already identified classes of information as confidential.²¹ All ISOs/RTOs have information policies to protect information received, created, and distributed in connection with the operation of and participation in the wholesale electric markets administered by ISOs and RTOs.²² The Commission should direct NERC to modify Section 1500 to provide express protection for information that is accorded confidential treatment by the Commission (and other applicable ERO governmental authorities), including information deemed confidential under an ISO or RTO information policy. Toward this end, the Commission should require NERC to amend Section 1502(1) to include the language shown in underlined text below:

Identification of Confidential Information – An owner, operator or user of the bulk power system and any other party (the “submitting entity”) may mark as confidential any document that it submits to NERC or a regional entity (the “receiving entity”) that it reasonably believes contains confidential information as defined by these rules or by any other rules, procedures, or tariffs approved by an ERO governmental authority.

¹⁹ Non-Governance Compliance Filing at 68.

²⁰ See Non-Governance Compliance Filing at Attachment 1, pp. 83-85.

²¹ See 18 C.F.R. § 388.107 (2006) (describing types of records that are exempt from public disclosure); 18 C.F.R. § 388.113 (2006) (concerning access to critical energy infrastructure information).

²² See, e.g., CAISO Tariff, § 20; MISO Open Access Transmission and Energy Markets Tariff, § 38.9.

Second, NERC's rules do not make it clear that third parties requesting confidential information from NERC that is protected by other confidentiality rules must also comply with such rules before they can receive such information. In many instances, pursuant to Commission-approved rules, ISOs and RTOs require third-party entities to file non-disclosure agreements before the ISOs and RTOs will release information about their market participants.²³ Provisions of Commission-approved information policies may also include requirements to notify the entity whose information is being requested and continue to hold the information confidential until legally compelled if the affected entity does not agree to allow disclosure even with the execution of a non-disclosure agreement.²⁴ In some cases, ISO and RTO tariffs prohibit the disclosure of confidential information to third parties at all.²⁵ The Commission should direct NERC to modify Section 1500 to specify that a request for information that is deemed confidential under other rules approved by the Commission (and other applicable ERO governmental authorities) must comply with those rules before the information can be released by NERC. Moreover, if an ISO or RTO rule, procedure, or tariff forbids or otherwise restricts the disclosure of confidential information to third parties, the NERC rules should likewise prohibit disclosure of, or enforce the restrictions applicable to, such information.²⁶

²³ See, e.g., CAISO Tariff, § 20.4(c); MISO Open Access Transmission and Energy Markets Tariff, § 38.9.4.

²⁴ See, e.g., ISO-NE FERC Electric Tariff No. 3, Attachment D (ISO-NE Information Policy).

²⁵ See, e.g., NYISO Market Services Tariff, Article 6.

²⁶ ERCOT's confidentiality policies and procedures are incorporated into the ERCOT Protocols, which are subject to the oversight of the Public Utility Commission of Texas.

E. The Commission Should Find that NERC Has Complied with the Directive to Adopt the Definitions of Terms Adopted in Order No. 672 and Should Recognize the Difference between the Bulk Power System (as Defined in Order No. 672) and the Bulk Electric System (as defined by NERC), at Least on “Day One” of ERO Operations.

In the July 20 Order, the Commission directed NERC to adopt definitions of the terms defined in Order No. 672 throughout the documents in NERC’s compliance filing, and specified that any other definitions of those terms would not be acceptable.²⁷ In the Non-Governance Compliance Filing, NERC states it has complied with this directive. As relevant here, NERC has included in its revised Rules of Procedure the definition of the term “bulk power system” that was contained in Order No. 672.²⁸

The IRC agrees that NERC has complied with the Commission’s directive to adopt the Order No. 672 definitions, including the definition of bulk power system. NERC also currently employs the term “bulk electric system,” which has a distinct meaning as discussed below.²⁹ The IRC respectfully submits that the Commission should recognize the difference between the bulk power system (as defined in Order No. 672) and the bulk electric system (as defined by NERC), at least on “day one” of ERO operations.

²⁷ July 20 Order at P 727.

²⁸ Non-Governance Compliance Filing at 71-72; Non-Governance Compliance Filing at Attachment 2, p. 5 (adding definition of bulk power system to revised Rules of Procedure). The Commission’s definition of bulk power system is quoted in footnote 4, *supra*. NERC adopts this same definition, albeit without the initial capitalization and the hyphenation of the words “Bulk-Power” found in the Commission version.

²⁹ In the Non-Governance Compliance Filing, NERC makes a number of references to the bulk electric system, though without defining it. *See, e.g.*, Non-Governance Compliance Filing at 10 (“Further, recognizing that bulk electricity system reliability and electricity markets are inseparable and mutually interdependent, NERC has also established five market interface principles with which all reliability standards must be consistent.”).

The distinction between the bulk power system and the bulk electric system is an issue that has already been raised with the Commission. In the proceeding regarding the development of NERC Reliability Standards (Docket No. RM06-16), Commission Staff raised concerns that differences in the definitions of bulk power system and bulk electric system might be inconsistent with Order No. 672, might create confusion as to which facilities and entities are covered by mandatory reliability standards, and might permit differing determinations among regions with respect to covered facilities and entities. In response, NERC stated that one possible solution to Commission Staff's concerns would be to revise the current definition of bulk electric system as follows to make it consistent with the definition of bulk power system:

As defined by the Regional Reliability Organization, using a reliability-impact method approved by the ERO, facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and electric energy from generating facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.³⁰

The IRC supports this revised definition of bulk electric system and believes that the Commission should recognize the distinction between the bulk electric system and the

³⁰ Comments of NERC on Staff Preliminary Assessment, Docket No. RM06-16-000 (June 26, 2006), at 25-29. The definition of bulk power system and the revised definition of bulk electric system quoted above are the same, except that the revised definition of bulk electric system begins with the words "As defined by the Regional Reliability Organization, using a reliability-impact method approved by the ERO, . . ." The two definitions are consistent with one another but the revised definition of bulk electric system means something more due to the addition of these words. In its comments, NERC stated that another possible solution to Commission Staff's concerns would be to remove the term bulk electric system from the reliability standards and replace it with the term bulk power system. *Id.* at 28. Currently, the definition of bulk electric system reads as follows:

As defined by the regional reliability organization, the electrical generation of resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition.

Id. at 26 (quoting NERC Glossary).

bulk power system, at least initially. The term bulk electric system has evolved over decades in NERC. The term has long been used in the industry, and is a technical term describing those facilities that must be included in planning models, system studies, operating assessments and reliability analyses that impact the reliability and operability of the interconnected transmission system. Moreover, existing transmission systems have been designed and installed based on this long-standing terminology. Furthermore, NERC's policies and standards were not developed to protect sub-transmission, distribution systems, or large load centers. Because uncertainty in power grid operations threatens the safe and reliable operation in the power grid, the Commission should seek, at least on "day one" of ERO operations, to maintain continuity in how mandatory Reliability Standards are applied to the power grid. Therefore, the Commission should maintain NERC's traditional interpretation of the meaning of the power grid and the bulk electric system. Further changes to the interpretation of the bulk electric system can be made pursuant to NERC's processes that have been approved by the American National Standards Institute ("ANSI"), and in accordance with any guidance provided by the Commission.³¹

³¹ In its recently issued Notice of Proposed Rulemaking concerning the development of the NERC Reliability Standards ("Reliability Standards NOPR"), the Commission noted NERC's recommendation that, for the initial approval of proposed Reliability Standards, the continued use of NERC's definition of bulk electric system is appropriate, and that, in the longer term, NERC suggests that change may be appropriate but that any global change at present will affect many Reliability Standards and is best achieved through the Reliability Standards development process. Reliability Standards NOPR, Docket No. RM06-16-000, at P 65 (Oct. 20, 2006). The Commission proposed that, for the initial approval of proposed Reliability Standards, "the continued use of NERC's definition of bulk electric system as set forth in the NERC glossary is appropriate," subject to certain interpretations of the term bulk electric system by the Commission. *Id.* at P 68. As the IRC will explain further in the comments it plans to submit on this issue pursuant to the Reliability Standards NOPR, the interpretation contemplated by the Commission in its NOPR goes beyond the current scope and applicability of the rule set in place at NERC.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the IRC respectfully requests that the Commission direct NERC to make the revisions described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties on the official service list compiled by the Secretary in the above-captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, DC this 17th day of November, 2006.

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