

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Rules Concerning Certification of the )  
Electric Reliability Organization; and ) Docket No. RM05-30-001  
Procedures for the Establishment, Approval, )  
and Enforcement of Electric Reliability Standards )

**REQUEST FOR REHEARING AND ALTERNATIVE REQUEST FOR  
CLARIFICATION OF THE ISO/RTO COUNCIL**

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, the ISO/RTO Council ("IRC")<sup>1</sup> respectfully requests rehearing of Commission Order No. 672, the final rule in the above-captioned proceeding.<sup>2</sup> The IRC has supported the creation of a strong international electric reliability organization ("ERO") capable of creating effective mandatory Reliability Standards. Order No. 672 marks a major milestone in the development of an ERO. The Commission deserves praise for issuing such a comprehensive rule within the deadline established by the Energy Policy Act of 2005. The IRC supports many aspects of Order No. 672 and appreciates that the Commission adopted many of the recommendations that the IRC made in its comments on the Notice of Proposed Rulemaking ("NOPR").

---

<sup>1</sup> The IRC is comprised of the nine functioning Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") in North America, *i.e.*, the Alberta Electric System Operator ("AESO"), California Independent System Operator Corporation ("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 the Southwest Power Pool ("SPP"). The IRC's mission is to work collaboratively to develop effective processes, tools, and standard methods for improving competitive electricity markets across North America. Certain IRC members are filing their own individual requests for rehearing in this proceeding.

<sup>2</sup> 114 FERC ¶ 61,104 (2006), 71 Fed. Reg. 8662 (Feb. 17, 2006) ("Order No. 672").

Nevertheless, there are certain errors and omissions in the final rule that the Commission must reverse or clarify on rehearing. In general, these errors and omissions have to do with the Commission showing too much deference to the ERO, or delaying critical policy decisions that should be made now. Additional Commission guidance on some key issues is essential because the North American Electric Reliability Council (“NERC”) is in the process of developing its ERO proposal. If the Commission waits until after an ERO application is filed, it may find itself constrained in its ability to require significant changes that could delay the ERO’s start up. Even if the Commission ultimately decides to postpone a resolution of these issues until after the application is filed, the IRC is seeking rehearing now in order to protect its rights in future proceedings concerning the NERC ERO application and in any subsequent appeals.

## **I. SPECIFICATION OF ERRORS**

In compliance with Commission Rule 713(c) and Order No. 663,<sup>3</sup> the Joint Filing Parties identify the following errors, or points requiring clarification, in Order No. 672:

1. The Commission should grant rehearing or clarify Order No. 672 in order to more firmly establish that the ERO should focus on establishing and enforcing Reliability Standards, not on implementation details or hands-on implementation. To do otherwise would be an error because it would authorize the ERO to take on functions that Congress did not intend. It would also give rise to real-time operating confusion and would lead to more conflicts between Reliability Standards and ISO/RTO tariffs.
2. The Commission should grant rehearing or clarification in order to clarify how it will evaluate the impact of Reliability Standards on competition. To do otherwise would be an error because it would leave the Commission with discretion to defer to the ERO on competition issues, which is not allowed under the Federal Power Act (“FPA”).
3. The Commission should clarify its regulations with respect to conflicts between Reliability Standards and ISO/RTO tariffs and rules. Specifically, the

---

<sup>3</sup> *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 112 FERC ¶ 61,297 (2005).

Commission should clarify that the ISO/RTO role is not purely ministerial and that transmission owners and users must consult with the ISO/RTO prior to the ISO/RTO reporting conflicts, and provide a role for the ERO and Regional Reliability Entities (“RREs”) in identifying such conflicts.

4. The Commission should grant rehearing of its decision to allow the ERO and RREs to keep penalty monies that they collect. Allowing them to keep the monies creates an appearance of impropriety and inappropriate incentives to over-collect.
5. The Commission should grant rehearing or clarification of its decision to review ERO and RRE governance proposals on a case by case basis. The lack of clear guidance from the Commission will allow the ERO to develop stakeholder governance provisions that will not give ISOs/RTOs an adequate voice in the Reliability Standards development process, in contravention of the FPA.

## **II. REQUEST FOR REHEARING AND CLARIFICATION**

### **A. THE COMMISSION SHOULD CLARIFY THE ERO’S ROLE CONCERNING STANDARD SETTING AND ENFORCEMENT AS OPPOSED TO IMPLEMENTATION OF STANDARDS**

The central theme of the IRC’s comments on the NOPR in this proceeding was that the Commission should direct the ERO to focus on the “what” of reliability, not the “how.”<sup>4</sup> In essence, the IRC proposed that the ERO should promulgate clear standards (and enforce them) but leave the implementation details to system operators, including ISOs/RTOs. The advantage of this approach is that it would help to ensure that the same Reliability Standards could be adapted for regions with and without organized electricity markets. It would also tend to minimize conflicts between Reliability Standards and ISO/RTO tariffs or market rules.

Order No. 672 expressed some “sympathy” for the IRC’s view. It also acknowledged that there are “certain limited situations where there may be good reason to leave implementation

---

<sup>4</sup> See *Comments of the ISO/RTO Council on Proposed Regulations* at 2, 12, 20-21, 26, Docket No. RM05-30-000 (Oct. 7, 2005).

practices out of a Reliability Standard.”<sup>5</sup> It went on to say, however, that for other Reliability Standards, “the ‘how’ may be such an inextricable part of the Reliability Standard that it needs to be specified by the ERO. Order No. 672 expressed concern that the absence of implementation details would result in less uniformity, more uncertainty, more difficult enforcement issues, and, more complex oversight challenges for the Commission. It therefore left it “to the ERO to develop proposed Reliability Standards that appropriately balance reliability principles and implementation features.”<sup>6</sup>

The IRC believes that it was an error for the Commission to leave an issue as important as this to resolution on a case-by-case basis, or to assign the ERO the task of “balancing” the need for prescriptive implementation requirements itself. To do so, is to delegate too much authority in the first instance to the ERO and to blur the lines between standard setting, a clear ERO function, and implementation, a clear system operator function that is undertaken pursuant to Commission-approved tariffs. If the Commission is reluctant to establish rules at this stage of the proceeding it should at least specify that the ERO should not take on the operational responsibilities of system operators, be they ISOs/RTOs, or other balancing authorities.<sup>7</sup>

This is not a hypothetical issue. It is clear from NERC’s latest draft ERO application<sup>8</sup> that it is considering added tasks and the provision of goods and services that are nowhere to be found in the language of new FPA Section 215 and its legislative history. For example, NERC is

---

<sup>5</sup> Order No. 672 at P 260.

<sup>6</sup> *Id.*

<sup>7</sup> The IRC has twice submitted comments to NERC on its draft ERO application warning of the dangers and problems of NERC involving itself in these matters. NERC has given no indication that it intends to change its proposal.

<sup>8</sup> See [http://www.nerc.com/~filez/ero\\_application.html](http://www.nerc.com/~filez/ero_application.html) (“Draft ERO Application”).

proposing to engage in activities relating to “situational awareness” and “infrastructure security” that would include “monitor[ing] present conditions on the bulk power system and coordinat[ing] emergency response.”<sup>9</sup> It would also provide “tools and support services,” including software, for reliability coordinators and work on identifying best practices for compliance with its own Reliability Standards.<sup>10</sup>

If an ERO were to perform such functions, there would be a great risk of real-time operational confusion for transmission owners and users that receive inconsistent instructions from the ERO and their local system operator. An ERO is very unlikely to have the institutional knowledge, resources, or technical expertise to carry out operational functions effectively, unless it has a budget and staff that go well beyond what was envisioned by Congress. There is no reason to think that Congress meant for the ERO to become a hands-on system operator or a purveyor of goods and services. In short, it is necessary for the Commission to send a clear signal that the ERO’s focus must be on setting and enforcing standards, not on implementing them.

It may be true that requiring reliability entities to focus on the “what” instead of the “how” of reliability will result in greater complexity because regions will find varying ways to implement Reliability Standards. If this occurs, however, it will be because legitimate regional differences, as well as the very nature of real-time operations, make such variations necessary. In particular, it is difficult to see how a single set of workable implementation procedures could apply to Transmission Providers in regions with and without organized electricity markets. The

---

<sup>9</sup> See, e.g., Draft ERO Application, ERO Rules of Procedure at Section 1000 (“Situation Awareness and Infrastructure Security”), *et seq.*

<sup>10</sup> See, e.g., *id.* at Section 1002 (“Reliability Support Services”); Section 800 (“Reliability Assessment and Performance Analysis”).

two environments are so different that they will often require Reliability Standards to be implemented in different ways. It would be a mistake to try to paper over these differences by insisting on uniform implementation procedures.

Finally, if the ERO does not focus on the “what” of reliability and adopt prescriptive implementation procedures, there will almost certainly be more conflicts between existing, Commission-approved, ISO/RTO tariffs and Reliability Standards. The undesirable consequence will be that many implementation details that should be left to regions to work out will wind up being litigated before the Commission. This will only add to the burden that the Commission’s conflict identification regulations already put on ISOs/RTOs (see Section C below). Resolving a large number of such disputes may also be difficult and burdensome for the Commission and its staff.

**B. THE COMMISSION SHOULD ESTABLISH CLEARER GUIDANCE REGARDING REVIEWS OF RELIABILITY STANDARDS’ IMPACT ON COMPETITION**

New FPA Section 215(d)(2) and Section 39.5(b)(3) of the Commission’s implementing regulations establish that the Commission will not defer to the ERO or an RRE “with respect to the effect of a proposed Reliability Standard or a proposed modification to a Reliability Standard on competition.” The NOPR sought comments on how the Commission should apply this principle. The IRC recommended that the Commission treat a Reliability Standard as having an effect on competition if it has an impact on ISO/RTO market rules, even short of an outright conflict. It also asked the Commission to confirm that it would not defer on any question of the impact of a standard on market rules or the significance of that impact to the effective functioning of the wholesale market.

The Commission stopped short of adopting the IRC's suggestions, opting instead to conduct case-by-case reviews of competitive effects without establishing substantive guidance.<sup>11</sup> While the final rule helpfully suggests that Reliability Standards will not be allowed to "have the implicit effect of either favoring or thwarting either bilateral or organized markets" or to unduly favor individual market participants or certain classes of them, it should go further. At a minimum, the Commission should incorporate these suggestions into the text of its proposed regulations. The regulations should also specify that any Reliability Standard that has any effect on tariffed ISO/RTO market rules will be subject to *de novo* Commission review. Moreover, the ERO should have the burden of demonstrating that its Reliability Standards do not adversely affect competition.

Failing to provide clearer guidance would be a legal error because it would effectively leave the Commission discretion to defer to the ERO on competition questions, which is prohibited under the FPA and which would expand the scope of the ERO's authority beyond the scope of what was delegated to it by Congress. Failing to provide clearer guidance would also be poor policy. In its current form, the Commission's case-by-case approach will create substantial uncertainty and give rise to controversy in the ERO and RRE stakeholder processes. It will lead to more conflicts between Reliability Standards and ISO/RTO tariffs that the Commission will only have to resolve later with substantial uncertainty in the interim..

**C. THE COMMISSION SHOULD CLARIFY ITS RULES ON THE IDENTIFICATION OF CONFLICTS BETWEEN ISO/RTO TARIFFS AND RELIABILITY STANDARDS**

Order No. 672 generally adopted the NOPR's proposals that ISOs/RTOs "expeditiously" inform the Commission and the ERO of any conflict between a Reliability Standard and a

---

<sup>11</sup> Order No. 672 at PP 376-78.

Commission-approved ISO/RTO tariff or rate schedule, or agreement. The Commission should clarify that transmission owners and users should consult with ISOs/RTOs prior regarding potential conflicts. In addition, the Commission should revise its regulations to provide a role for the ERO and RRE in identifying potential conflicts.

ISOs/RTOs are the most knowledgeable about their own tariffs, rules, and procedures, and are well-positioned to distinguish between actual and merely perceived inconsistencies. Moreover, the IRC believes that the role of the ISOs/RTOs in this regard is not purely a ministerial one. The IRC therefore believes that transmission users and owners should be required to consult with local ISOs/RTOs prior to the ISO's/RTO's reporting of potential conflicts to the Commission. In the event of a disagreement as to whether a conflict exists, the ISO/RTO would submit the concern raised by the transmission user or owner together with its own comments on the subject.

In addition, the Commission's regulations give the ERO and RREs no role in identifying potential conflicts. This is inconsistent with the Commission's policy determination that potential conflicts should be addressed during the standards development process because it encourages reliability entities to leave it to ISOs/RTOs to find conflicts and call them to the Commission's attention. (As is noted below in Section E, the ERO would also be insufficiently sensitive to ISO/RTO concerns if the current version of its stakeholder review process is ultimately endorsed by the Commission.) The ERO should therefore be expected to identify any potential conflicts with existing ISO/RTO tariffs and rules at the time it submits proposed new Reliability Standards to the Commission. Finally, the Commission should revise its regulations to establish that any party, including the ERO, that calls for a tariff or market rule to be revised in order to eliminate a conflict with a Reliability Standard will have the burden of persuasion.

**D. ALLOWING THE ERO TO USE MONIES COLLECTED THROUGH PENALTIES FOR ITS OWN PURPOSES CREATES INAPPROPRIATE INCENTIVES AND AN APPEARANCE OF IMPROPRIETY**

As Order No. 672 acknowledges,<sup>12</sup> the IRC, and certain other commenters, urged the Commission not to allow penalty monies to “accrue to any of the ERO’s or regional entities’ standards setting or enforcement functions.”<sup>13</sup> The concern was that such a rule could give the ERO an improper incentive to over-collect penalties that would in turn create a serious appearance of impropriety.

The Commission appears to have agreed with this concern but failed to adequately address it. While the Commission saw a “disadvantage in directing that penalty monies offset a specific program, such as a compliance or enforcement program,” it nevertheless took the view that “it is appropriate for the entity investigating an alleged violation and imposing a penalty to receive any penalty monies that result from that investigation.”<sup>14</sup> No explanation is offered for why this is so. Similarly, although the Commission concluded that penalty monies should not be used to offset the costs of enforcement programs, it found that it would be appropriate for them to offset the enforcing entity’s budget for implementing FPA Section 215. The Commission’s stated rationale, *i.e.*, that using the funds to offset the budget would yield consumer savings, would also justify using the funds to offset the enforcement budget. There is no explanation of why the Commission is willing to allow a general offset but opposes more specific ones, when the practical result, and the undesirable incentives created, are exactly the same.

---

<sup>12</sup> Order No. 672 at P 621.

<sup>13</sup> IRC Comments at 18-19.

<sup>14</sup> Order No. 672 at PP 626-27.

The IRC urges the Commission to adopt a clear rule requiring the ERO and Regional Reliability Entities to direct penalty monies received from U.S. entities to the U.S. Treasury, which would be appropriate since the penalties are imposed using delegated authority under the Federal Power Act. Similarly, the IRC anticipates penalty monies collected from Canadian entities will remain within the appropriate provincial jurisdiction. The IRC continues to believe that allowing the ERO or RREs to use penalty funds for any purpose, not just for enforcement-related purposes, is inappropriate. The ERO and RREs should have no incentive to impose excessive or unnecessary penalties. Order No. 672 gives them such an incentive insofar as their performance, and cost-effectiveness, will be periodically reviewed by the Commission.

**E. THE COMMISSION SHOULD SPECIFY THAT ISOS/RTOS MUST BE ADEQUATELY REPRESENTED IN ERO AND RRE GOVERNANCE BODIES**

In its comments on the NOPR, the IRC asked the Commission to clarify that ISOs and RTOs should be adequately represented in ERO and RRE governance systems. It specifically noted that “[g]iven the very limited number of RTOs or ISOs in any region, including them in any large group of entities . . . whose interests are not aligned with theirs means that they will be easily outvoted in any one-person, one-vote structure.” The IRC feared that this would lead to ISOs/RTOs “not being adequately represented on reliability matters, despite their very significant reliability role.”<sup>15</sup>

Order No. 672 was silent on this issue, opting instead to take up individual ERO and RRE governance proposals on a case-by-case basis. Unfortunately, the Commission’s silence appears to be having the very effect that the IRC feared. Despite multiple requests from the IRC and its members, NERC’s current draft ERO application proposes to include ISOs and RTOs in the

---

<sup>15</sup> IRC Comments at 22.

same voting “segment” as RREs in the proposed “Registered Ballot Body” (“RBB”).<sup>16</sup> The RBB would be the entity that reviews and approves proposed Reliability Standards before they are submitted to the ERO’s independent Board.

It would be an error for the Commission to allow this. In much of North America, ISOs/RTOs and RREs will be different entities with entirely different responsibilities and interests. Indeed, RREs will likely be overseeing ISO/RTO compliance with Reliability Standards and may be imposing sanctions for violations. Including RREs and ISOs/RTOs in the same segment will substantially dilute ISOs/RTOs’ ability to influence the development of Reliability Standards. This will inevitably increase the number of standards implementation problems, and the number of conflicts between Reliability Standards and ISO/RTO tariffs and market rules. It is ironic for the Commission, on one hand, to hold ISOs and RTOs that wish to serve as RREs to a heavy burden to justify why their functions should not be separated and then allow RREs and ISOs/RTOs to be considered as a common segment for purposes of voting on reliability standards.

The Commission could rectify this problem by clearly stating on rehearing that ISOs/RTOs have a unique perspective and valuable expertise that warrants their having their own voting segment. Watering down ISOs/RTOs’ vote would be inconsistent with FPA Section 215(c)(2)(A) which dictates that the ERO must have “fair stakeholder representation” and “balanced decisionmaking” in all of its committees and “subordinate organizational structures.” If the ERO files an application that does not respect this principle the IRC will be forced to

---

<sup>16</sup> See Draft ERO Application, ERO Rules of Procedure at Section 305. The same problem would not exist in the Member Representatives Committee, which would elect directors to the ERO Board, vote on bylaw changes, and advise the Board on certain matters (not including the development of Reliability Standards).

protest at it that time. To avoid needless litigation, the IRC is seeking rehearing now in order to avoid a future conflict at the Commission, and to preserve its appeal rights.

### **III. CONCLUSION**

WHEREFORE, for the foregoing reasons, the ISO/RTO Council respectfully asks that the Commission grant rehearing, or in the alternative, clarification, of the errors identified above.

Respectfully submitted,

Craig Glazer /ms

Craig Glazer  
Vice President – Federal Government Policy  
PJM Interconnection, L.L.C.  
1200 G Street, N.W., Suite 600  
Washington, D.C. 20005

Stephen G. Kozey /ms

Stephen G. Kozey  
Vice President and General Counsel  
Midwest Independent Transmission  
System Operator, Inc.  
701 City Center Drive  
Carmel, Indiana 46032

Matthew F. Goldberg /ms

Matthew F. Goldberg  
Senior Regulatory Counsel  
ISO New England Inc.  
One Sullivan Road  
Holyoke, MA 01040

Charles Robinson /ms

Charles Robinson  
Vice President and General Counsel  
California Independent System  
Operator Corporation  
151 Blue Ravine Road  
Folsom, CA 95630

Kim Warren /ms

Kim Warren  
Manager, Regulatory Affairs  
Independent Electricity System Operator  
of Ontario  
655 Bay Street, Suite 410  
Toronto, Ontario, M5G-2K4 Canada

Robert E. Fernandez /ms

Robert E. Fernandez  
Vice President and General Counsel  
Elaine Robinson  
Director of Regulatory Affairs  
New York Independent System  
Operator, Inc.  
290 Washington Avenue Extension  
Albany, N.Y. 12203

Stacey Duckett /ms

Stacey Duckett  
General Counsel & Corporate Secretary  
Southwest Power Pool  
415 North McKinley  
#140, Plaza West  
Little Rock, AR 72205-3020

Larry Kram /ms

Larry Kram  
Senior Legal Counsel  
Alberta Electric System Operator  
Calgary Place  
2500 330 – 5th Avenue SW  
Calgary, AB T2P 0L4

Carolyn Shellman /ms

Carolyn Shellman  
Vice President and General Counsel  
Electric Reliability Council of Texas  
7620 Metro Center Dr.  
Austin, TX 78744

March 6, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this day served the foregoing document on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 6<sup>th</sup> day of March, 2006.



Michael E. Haddad  
Hunton & Williams LLP  
1900 K Street, NW  
Washington, DC 20006  
(202) 955-1500