

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Corporation

Docket No. RR06-1-000

**REQUEST FOR REHEARING OR CLARIFICATION
OF THE TRANSMISSION ACCESS POLICY STUDY
GROUP**

On July 20, 2006, the Commission issued an “Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing,” 116 F.E.R.C. ¶ 61,062 (2006) (“Certification Order”). Pursuant to 16 U.S.C. § 825*l* and 18 C.F.R. § 385.713, the Transmission Access Policy Study Group (“TAPS”) requests rehearing or, in the alternative, clarification of the Commission’s new regulation. Because of the pressing need to get NERC up and running as ERO, TAPS is narrowly limiting its request for rehearing or clarification to issues critical to ensuring balanced representation and consistent interpretation and enforcement of NERC standards.¹

I. STATEMENT OF ISSUES

Pursuant to Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2), TAPS provides the following statement of issues:

1. Whether the ballot body TDU definition should be conformed to the Bylaws’ TDU definition for the Member Representatives Committee, as the Certification Order at P 92 seems to require, but also appears to allow NERC to chose to do otherwise? FPA § 215, 16 U.S.C. 824o.

¹ For example, while TAPS continues to believe that the Certification Order’s approval of the By-Laws’ over-broad hold harmless provision (at P 56) discourages and burdens membership, and is inconsistent (and largely makes irrelevant to members) the Order’s treatment of other hold harmless/indemnification clauses (*see* PP 495, 598), TAPS is not seeking rehearing or clarification of that issue.

2. Whether the Commission should require NERC to better delineate the scope of regional criteria? FPA § 215, 16 U.S.C. § 824o; Order No. 672 at PP 327, 486, 561, 654.
3. Whether the Commission should require NERC to be clearly authorized and obligated to review regional criteria for consistency with reliability standards? FPA § 215, 16 U.S.C. § 824o; Order No. 672 at PP 327, 486, 561, 654.
4. Whether the Commission should require NERC review of all settlements? FPA § 215, 16 U.S.C. § 824o; Order No. 672 at PP 327, 486, 561, 654.

II. IDENTIFICATION OF ERRORS

Pursuant to Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1), TAPS identifies the following errors:

1. Although the Certification Order at P 92 correctly required the ballot body TDU definition to be conformed to the broader Bylaws' TDU definition for the Member Representatives Committee, the Order also appears to allow NERC to chose to do otherwise. Clarification, or rehearing, is required to ensure that the TDU definition for ballot body purposes encompasses joint action agencies and generation and transmission cooperatives.
2. The Certification Order fails to require NERC to clearly delineate the scope of regional criteria, creating the potential for confusion and inconsistent interpretation and enforcement of NERC standards.
3. The Certification Order fails to require that NERC be clearly authorized and obligated to review regional criteria for consistency with reliability standards. The maintenance and creation separately-enforceable regional criteria covering the same domain as NERC standards, without any provision for NERC review for consistency, is contrary to the statutory scheme and this Commission's intent to encourage consistency in standards and their enforcement.
4. The Certification Order fails to require NERC review of all settlements, undermining the consistency of interpretation and enforcement of reliability standards that Order 672 viewed as essential.

III. ARGUMENT

A. The Commission Should Clarify that the Ballot Body TDU Definition should be Conformed to the Bylaws' TDU Definition for the Member Representatives Committee

In TAPS Limited Protest, we noted that in the Bylaws, Transmission Dependent Utilities are properly defined to include municipal joint action agencies and G&T coops:

Transmission-dependent utility — This sector includes any entity with a regulatory, contractual, or other legal obligation to serve wholesale aggregators *or customers* or end-use customers and that depends primarily on the transmission systems of third parties to provide this service. This sector also includes organizations that represent the interests of such entities.

Proposed Bylaws Article II § 4(a)(v) (emphasis added). The TDU definition used for the standards development ballot body uses similar but different language that omits the Bylaws' reference to serving wholesale customers (italicized above). ROP § 305.5.4 *See also* Reliability Standards Development Procedure ("RSDP") at 37 (containing the same inconsistent definition). We explained that this omission is very significant. Numerous TDUs, including joint action agencies and G&T cooperatives, serve wholesale customers, not wholesale aggregators or end-use customers. This omission, if not corrected, could result in the exclusion of entities most commonly thought of as TDUs from the TDU ballot body segment.

In the Certification Order (at P 92), the Commission "agree[d] with TAPS that the definition of 'transmission-dependent utilities' in the Bylaws and Rules of Procedure should be consistent" and "direct[ed] NERC in its compliance filing to amend the Rules of Procedure to mach [sic] the broader definition in the Bylaws." This instruction seems to clearly require NERC to conform the ballot body TDU definition to the broader definition in the Bylaws, as TAPS requested. However, the clarity of that directive was impaired, perhaps inadvertently, by the additional requirement that "NERC should fully explain or justify whichever definition is chosen," *id.*, suggesting NERC may choose either the broader or the narrower definition, which would arbitrarily exclude

transmission dependent joint action agencies and generation and transmissions coops from the TDU ballot body segment.

On rehearing, the Commission should make clear what seems to be the intent of the Certification Order, and what is in any event required to achieve FPA § 215(c)(2)(A) and (D)'s fair stakeholder representation, balanced decision-making, and balance of interests requirements: To ensure inclusion of joint action agencies and G&T cooperatives, the definition of the TDU segment for ballot body purposes (ROP § 305.5.4; *see also* RSDP at 37) should be modified to match Proposed Bylaws Article II § 4(a)(v)'s broader definition of the TDU sector for the Member Representatives Committee.

B. The Commission Should Require NERC to Better Delineate Regional Criteria and Should Make Clear that NERC is Authorized and Obligated to Review Regional Criteria for Consistency with Reliability Standards

In our Limited Protest, TAPS pointed out that NERC's Rules of Procedure, § 202.14, defines regional criteria as (emphasis added):

“Regional criteria” means reliability requirements developed by a regional reliability organization that are necessary to implement, to augment or to comply with reliability standards but which are not reliability standards. Such regional reliability organization criteria may be necessary to account for physical differences in the bulk power system, but are not inconsistent with reliability standards nor do they result in lesser reliability. Such regional reliability organization criteria are not enforceable pursuant to NERC-delegated authorities, but may be enforced through state or provincial actions to ensure the safety, adequacy and reliability of electric service in their respective jurisdictions, or through other available mechanisms. Regional reliability organization criteria may include specific acceptable operating or planning parameters, guides, agreements, protocols and other documents.

Section 314.1 of the Rules of Procedure further describes regional criteria (*italics added*):

Regional criteria—*Regional entities may develop regional criteria that are necessary to implement, to augment or to comply with reliability standards, but which are not reliability standards. Regional criteria may also address issues not within the scope of reliability standards, such as resource adequacy. Regional criteria may include specific acceptable operating or planning parameters, guides, agreements, protocols or other documents used to enhance the reliability of the regional bulk power system. These documents typically provide benefits by promoting more consistent implementation of the NERC reliability standards within the region. These documents are not NERC reliability standards, regional reliability standards or regional variances and therefore are not enforceable under authority delegated by NERC pursuant to delegation agreements and do not require NERC approval.*

ROP § 314.2 provides for NERC to maintain a current catalog of regional reliability criteria, but does not provide for NERC review:

Catalog of Regional Reliability Criteria—NERC shall maintain a current catalog of regional reliability criteria. Regional reliability organizations and regional entities shall provide a catalog listing of regional reliability criteria to NERC and shall notify NERC of changes to the listing. Regional reliability organizations and regional entities shall provide any listed document to NERC upon written request.

TAPS expressed concern that the maintenance and creation (through an unspecified process) of not-clearly-delineated, separately-enforceable regional criteria covering the same domain as NERC standards, without any provision for NERC review for consistency, is contrary to the statutory scheme and this Commission's intent to encourage consistency in standards and their enforcement. Order 672 at PP 291, 654. *See also* ROP § 402.6. We argued that differing regional criteria are likely to lead to different interpretations and applications of the same NERC reliability standard. We

asked the Commission to require NERC to better delineate the scope of regional criteria, so that they are clearly differentiated from overlapping terms that are treated significantly differently in terms of development process, the role of NERC, and enforceability, *i.e.*, “regional reliability standards” (defined in ROP § 202.13); and NERC “interpretations” of reliability standards (defined in RSDP at 23-24). Further, we urged that NERC should be obligated to review regional criteria to ensure consistency in the interpretation and application of NERC reliability standards (where regional criteria pertain to matters within the ERO and Commission jurisdiction—reliability standards as defined by Section 215(a)(3)).

The Certification Order concluded that the definition and scope of regional criteria did not require clarification. Certification Order at P 281. Although the Commission agreed with TAPS concerns about inconsistencies between reliability standards and regional criteria, it simply asked Regional Entities to avoid adopting criteria that detract from the NERC standards. *Id.* at P 281:

We disagree with TAPS that the definition and scope of regional criteria requires further clarification than provided by NERC in section 202.14 of its proposed Rules of Procedure. We understand regional criteria to be standards of behavior of a voluntary nature, for example, the method through which a region intends to implement a Commission-approved Reliability Standard. They are not enforceable under the FPA and they cannot preempt a Commission-approved Reliability Standard. We do however agree with TAPS that inconsistencies between regional criteria and Reliability Standards could lead to unnecessary confusion. Therefore, Regional Entities must avoid adopting any voluntary rules that detract from a Commission-approved Reliability Standard.

Later in the Certification Order (at P 616 & n.221), the Commission explained its view that regional criteria would not circumvent reliability standards because they were

voluntary, they could not preempt NERC standards, and NERC was in the process of reviewing regional criteria for consistency:

We reiterate our discussion in the Reliability Standard development section of this order that regional criteria are standards of behavior of a voluntary nature that are not enforceable under the FPA and they cannot preempt a Commission approved Reliability Standard. As such, these voluntary standards or practices cannot be used to circumvent the mandatory Reliability Standard system. Furthermore, NERC indicates that it is in the process of a review of the status and consistency of the regional criteria and procedures to determine a recommended course of action for each.²²¹

²²¹ NERC intends to form a task force to review the status and consistency of the regional criteria and procedures and “fill in the blank” standards, and determine a recommended course of action for each standard. The task force will prepare a report and work plan for board approval on November 1, 2006. NERC is expected to file the report and work plan for approval with the Commission on November 8, 2006. The plan will provide a detailed schedule for addressing all of the regional “fill-in-the blank” standards.

The Certification Order’s failure to meaningfully address TAPS’ concerns needs to be revisited on rehearing to ensure the regional criteria do not undermine Congress’ important objectives in enacting Section 215 and Order 672’s commitment to consistent interpretation and enforcement of reliability standards.

1. Regional Criteria Must be Clearly Differentiated from Other Similar Terms

The definitional overlaps among terms with significantly different consequences – “regional criteria,” regional reliability standards” and “interpretations of standards” – needs to be addressed if there is to be any hope of achieving consistent interpretation and enforcement of NERC standards.

There is no ascertainable division between regional reliability standards and regional criteria; both are defined as “augmenting” a reliability standard. *Compare* ROP §§ 202.13 and 202.14. Although the terms cover the same territory, categorization as a regional criterion versus a regional reliability standard matters: Regional criteria are not reviewed by NERC or this Commission and are not enforceable under the FPA, while regional standards are.

Nor is there a clear line between regional criteria (“necessary to implement, to augment or to comply with reliability standards” ROP§ 202.14) and “interpretations of standards” intended to clarify and avoid incorrect interpretations of reliability standards. RSDP at 23-24. But interpretations are subject to approval through the ballot pool and are incorporated into standards, *id.*, while regional criteria are not.

Overlapping definitions of terms with different consequences in terms of approval requirements and enforcement can result in serious problems. Without clear differentiation of what fits in which category, there could be multiple investigations and enforcement efforts with regard to the same violation – one of the NERC standard through the NERC compliance process, one of the regional criteria, through a separate compliance process. Inconsistent interpretation and application of NERC standards is all but invited by the confusion among important terms. It is not even clear who decides whether a particular protocol is, for example, a regional reliability standard or regional criteria. If it is the regional entity (or regional reliability organization) there is no assurance of consistency in that categorization, again undermining Order 672.

The definitional confusion is highlighted by the internal inconsistencies in the ROP’s descriptions of regional criteria. The ROP’s regional criteria “definition”

identifies the “regional reliability organization” as developing regional criteria. *See* ROP § 202.14 (quoted above). In contrast, the ROP section purporting to use and implement the regional criteria definition refers to regional *entities* as the developer of regional criteria. *See* ROP § 314.1 (quoted above).² To make matters worse, the cataloging provision (ROP § 314.2, quoted above) refers to both regional entities and regional reliability organizations in this context. We assume that addressing these inconsistencies is encompassed with the Commission’s requirement that NERC explain the distinction between regional reliability organizations and regional entities. Certification Order at P 76. If not, it certainly should be included on rehearing.

2. NERC Must Be Empowered and Required to Review Regional Criteria for Consistency With NERC Standards

The Certification Order recognizes that “inconsistencies between regional criteria and Reliability Standards could lead to unnecessary confusion.” P 281. Given this finding, none of the reasons provided in the Order supports the Commission’s failure to take the steps necessary to eliminate that “unnecessary confusion” and to achieve the consistent interpretation and enforcement of NERC standards that Order 672 requires.

The Commission’s conclusion that the potential for inconsistencies between standards and regional criteria is not a problem appears to rely on the incorrect assumption that NERC is authorized to review criteria and is committed to do so. *See* Certification Order at P 616 (“NERC indicates that it is in the process of a review of the status and consistency of the regional criteria and procedures to determine a recommended course of action for each”); *see also id.* at n.221 (describing the intended

² *See also* Certification Order at PP 260, 281 (suggesting that the criteria are developed by the regional entity).

process). To the contrary, in describing regional criteria, ROP § 314.1 makes express that they “do not require NERC approval” and ROP § 314.2 provides only for NERC to maintain a current catalog of regional reliability criteria; it does not provide for NERC review. If NERC’s function is merely to catalog the differing regional criteria, we will not move toward a consistent set of “best practices,” contrary to Order 672’s directive. Order 672 at P 292.

Even if, notwithstanding the ROP’s express terms, NERC is somehow authorized to review regional criteria for consistency with NERC standards, nothing would obligate it to do so. While NERC may presently “intend[.]... to review the status and consistency of the regional criteria,” Certification Order at P 616 n.221, NERC is free to abandon that effort. In short, the only way to ensure the NERC review that the Commission assumes to be occurring is to require NERC to revise its Rules of Procedure to empower and obligate NERC to review regional criteria for consistency with NERC standards.

Reliance on regional entity forbearance from adopting new criteria that detract from reliability standards, Certification Order at P 281, is a plainly insufficient approach to addressing a concern the Commission shares – “that inconsistencies between regional criteria and Reliability Standards could lead to unnecessary confusion.” *Id.* Congress plainly did not intend the Commission to rely on the “honor system” as the means to carry out its statutory obligations under Section 215. In any case, future good behavior by regional entities in adopting criteria would not address the problems created by inconsistencies among already-existing criteria that the Certification Order recognizes. Certification Order at P 616 & n.221.

Finally, where, as the Certification Order notes (at P 281), regional criteria are “the method through which a region intends to implement a Commission-approved Reliability Standard,” the Commission cannot avoid its Section 215 obligations by pointing to the “voluntary” nature of the criteria, *id.* at P 616, an assumption that is not necessarily correct.³ In any event, the lack of enforceability of regional criteria under the FPA does not stop regional criteria from interfering with the uniformity in interpretation and enforcement of NERC standards that Order 672 demands.

On rehearing, the Commission should require NERC to ensure that regional criteria do not result in differing regional interpretations and applications of the same NERC standard. NERC should be obligated to review regional reliability criteria to ensure consistency in the interpretation and application of NERC reliability standards (where regional reliability criteria pertain to matters within the ERO and Commission jurisdiction, *i.e.*, reliability standards as defined by FPA § 215(a)(3)). Criteria that pertain to matters outside the scope of FPA § 215(a)(3), *e.g.*, adequacy, would not be subject to the ERO’s review for consistency.

C. The Commission Should Require NERC Review of All Settlements

In rejecting arguments by TAPS and others that the ERO should review and approve all settlements by regional entities, the Commission explained:

NERC explains in its reply comments that, to assure consistency, it has reserved the right to participate in Regional Entity settlement processes, and will review all settlements prior to filing a notice of penalty with the

³ Because a regional entity’s bylaws may well require all members to adhere to regional criteria, criteria cannot be assumed to be “voluntary.” Membership is essential to obtaining a voice in the region’s interpretation and enforcement of standards, and in its development of standards to propose to NERC (to ensure they meet the needs of diverse utilities in the region).

Commission. We find that the measures proposed by NERC, along with other safeguards such as regional audits and periodic assessments, provide adequate oversight to assure consistency. If future experience shows an unacceptable level of inconsistency among Regional Entity settlements, NERC may propose, or the Commission may require, a change in these Rules.

Certification Order at P 479. TAPS remains concerned that the approach adopted by NERC, and approved by the Commission, is at odds with the consistency of interpretation and enforcement of reliability standards that Order 672 seeks to promote.

For example, NERC's commitment to "review all settlements prior to filing a notice of penalty with the Commission," Certification Order at P 474, is inapplicable to settlements that do not result in a notice of penalty being filed with the Commission. Not all settlements will result in a penalty, as made clear by the Certification Order's correct confirmation that "any settlement of a potential violation to which a Regional Entity or the ERO is a party must be made public, whether or not a violation has been alleged or a finding of violation has occurred." *Id.* at P 404. Yet the Regional Entity's decision as to whether to press for an admission of a violation or imposition of a penalty, or to settle short of such action, is an area where there can be differences among the regions that may drive towards the least common denominator problem the Commission is seeking to avoid.

The mere ability of NERC to participate in the Regional Entity settlement process or to review settlements does not go far enough to ensure the consistency in the enforcement of reliability standards that Order 672 requires. *See, e.g.*, Order 672 at PP 327, 486, 561, 654. Nor should the Commission wait for audits and experience to show an "unacceptable level of inconsistency among Regional Entity settlements."

Certification Order at P 479. By that time, the damage will already be done to NERC's "fairness, integrity and public reputation" that the Commission is seeking to protect. *Id.* at P 478.

On rehearing, the Commission should require NERC to review all regional entity settlements and other negotiated dispositions before they become final. Particularly in the absence of very specific settlement guidelines, such NERC review is essential to maintain respect for and enforcement of standards throughout the continent.

CONCLUSION

The Commission should rehear or clarify its Certification Order, as requested above.

Respectfully submitted,

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August 21, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have on this 21st day of August, 2006, caused the foregoing document to be sent by electronic mail to all parties on the list compiled by the Secretary of the Commission in this proceeding.

/s/ Rebecca J. Baldwin

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