

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Council and North American Electric
Reliability Corporation

Docket No. RR06-1-002

**LIMITED PROTEST OF TRANSMISSION ACCESS
POLICY STUDY GROUP**

On September 18, 2006, North American Electric Reliability Council and North American Electric Reliability Corporation (collectively referred to herein as “NERC”) filed a compliance filing (“Compliance Filing”) to modify NERC’s governance structure in response to the Order Certifying NERC as the Electric Reliability Organization (“ERO”) and Ordering Compliance filing, 116 F.E.R.C. ¶ 61,062, issued July 20, 2006 (“July 20 Order”). While the Transmission Access Policy Study Group (“TAPS”), an intervenor in the underlying proceeding, largely supports NERC’s filing,¹ TAPS has concerns about limited aspects of NERC’s filing. For this reason, pursuant to the September 20, 2006 notice and Rule 211 of the Commission’s Rules of Practice and Procedure (18 C.F.R. § 385.211), TAPS submits this limited protest.

¹ In particular, in Item 11 of its filing, NERC proposes to comply with P 92 of the July 20 Order by revising the definition of transmission-dependent utilities in its Rules of Procedure to match the broader definition in Article II, Section 4.a.v of the Bylaws. Such action would moot the first issue on which TAPS sought rehearing or clarification. *See* TAPS August 21 Request for Rehearing or Clarification at 2-4, *available at* <http://elibrary.ferc.gov/search/fercadvsearch.asp> (“e-Library”) Accession No. 20060821-5026 (“TAPS Request for Rehearing”).

A. *Lack of Clarity Concerning Regional Entities and Regional Reliability Organizations (Compliance Filing Item 4/July 20 Order P 76)*

The July 20 Order expresses concern about the vagueness of the relationships between Regional Reliability Organizations and Regional Entities. NERC's Compliance Filing largely asks the Commission to wait for filing of delegation agreements, thus leaving continued confusion in this regard.

For example, NERC's filing does not resolve or explain the contradictory definitions of "regional criteria" described by TAPS in its August 21 Request for Rehearing at 4-9, especially 8-9: the definition of regional criteria, in Section 202.14 of the Rules of Procedure, says that regional criteria are developed by a regional reliability organization, while Section 314.1 of the Rules of Procedure says that Regional Entities may develop regional criteria. Because, as NERC notes in Item 4 of its Compliance Filing, Regional Reliability Organizations and Regional Entities may or may not be the same organization in a given region, NERC should clarify which will have the power to develop regional criteria.²

B. *Failure to Ensure Balanced Decision-Making (Compliance Filing Item 14: July 20 Order P 105)*

As originally filed, Section 1302 of the Rules of Procedure provides:

Each committee shall have a defined membership composition that is explained in its charter. Committee membership may be unique to each committee, and can provide for balanced decision-making by providing for representatives from each sector, or by bringing together a wide diversity of opinions from industry experts with outstanding technical knowledge and experience in a particular subject area. Committee membership shall also

² As discussed in TAPS Request for Rehearing, TAPS has additional concerns regarding regional criteria.

provide the opportunity for an equitable number of members from the United States and Canada, based approximately on proportionate net energy for load. Committees that are established on a sector basis must ensure that no two stakeholder sectors are able to control the vote on any matter, and no single sector is able to defeat a matter.

In P 104 of the July 20 Order, the Commission concluded (emphasis added) “that NERC’s proposal to structure committees with either sector representatives or diverse industry experts” did not “*necessarily* violate[] the concept of balanced decisionmaking” because NERC “can and should take such relationships into account when structuring and approving committees” and board approval of committee appointments “should help ensure balanced committees.” In P 105 of the Order, the Commission went on to find that “Section 1302 of the Rules of Procedure appears to allow a single sector to control the vote in a committee, or other sub-organizational structure, which is not established on a sector basis. NERC’s proposal is not consistent with Order No. 672.” It then ordered NERC to correct this non-compliant provision. *Id.*

NERC’s Compliance Filing revises the second sentence of Section 1302 to read:³ “[s]tanding committee membership shall provide for representatives from each sector unless such sector representation will not bring together the necessary diversity of opinions from industry experts with outstanding technical knowledge and experience in a particular subject area,” but makes no change to the final sentence. By making this change, NERC fails to correct the “non-compliant provision” identified in P 105 (*i.e.*, it

³ NERC also proposes to limit Section 1302 (and the rest of Section 1300) to standing committees. The July 20 Order made no such requirement. Further, it appears contrary to NERC’s Bylaws (Bylaws Article VII, § 1 (authorizing formation of “standing committees and other committees”) and Bylaws Article XI, § 1 (which provides that the Rules of Procedure will provide rules governing “standing committees..., subgroups of standing committees, and other committees, subcommittees, task forces, and sector-specific

would continue “to allow a single sector to control the vote in a committee, or other sub-organizational structure, which is not established on a sector basis”), and moves away from the balanced decision-making required by P 104, Order No. 672,⁴ and Section 215(c)(2)(A) of the Federal Power Act.⁵

NERC’s revised second sentence suggests that NERC may exclude a particular sector from a committee if it finds that sector’s expertise insufficient. Such a reading is confirmed by NERC’s explanation (Compliance Filing at 20) that the revision “recognizes that, in some situations, sufficient expertise may not exist in all sectors.” In discussing the Critical Infrastructure Protection Committee, NERC identifies “operations” as one of three technical areas where “NERC finds this expertise primarily among the larger organizations and the reliability coordinators.” *Id.*

What is missing from NERC’s revised language and explanation is a recognition of the need for “*balanced* decisionmaking in any ERO committee or subordinate organizational structure.” (Section 215 (c)(2)(A), *emphasis added*). A committee made up exclusively of “larger organizations and ... reliability coordinators” (*id.*) is unlikely to provide the balanced decisionmaking Section 215(c)(2)(A) and Order 672 require. NERC’s approach overlooks the fact that smaller systems have expertise in how smaller systems operate – expertise that large systems often lack. NERC’s rationale suggests that

forums of the Corporation”)).

⁴ *Rules Concerning Certification of the Electric Reliability Organization, and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order 672, 71 Fed Reg. 8,662 (Feb. 17, 2006), III F.E.R.C. Stat. & Regs. ¶ 31,204 (to be codified at 18 C.F.R. pt. 39), *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006) (“Order No. 672”), *on reh’g* Order No. 672-A, 71 Fed Reg. 19,814 (April 18, 2006), III F.E. R.C. Stat. & Regs. ¶ 31,212, *appeal pending sub nom. New York Independent System Operator v. FERC*, No. 06-1185 (docketed D.C. Cir. May 30, 2006).

⁵ Pub L. No. 109-58, § 1211, 119 Stat. 594, 942 (2005) (to be codified at 16 U.S.C. § 824o) (“Section 215(c)(2)(A)”).

it could move away from sector representation in the operations committee, which has had sector representation for a number of years. Especially where reliability standards are to apply to entities other than “the larger organizations and the reliability coordinators,” perceived expertise should not be a basis for excluding sectors from committees.⁶ The July 20 Order did not authorize NERC to allow for committees that fail to achieve balance – whether by sectors or by diversity of experts. July 20 Order at P 104. Rather, even in committees of experts the Commission required NERC to consider affiliations and relationships, and through board action structuring committees to “ensure balanced committees.” *Id.*

NERC argues that Order 672’s requirement that no two stakeholder segments will be able to control the vote or any matter, and no single sector will be able to defeat a matters, does not have to be strictly enforced

[w]hen the votes by subgroups are not binding on NERC or are subject to final approval by the Board or a “properly constituted” standing committee ... [s]uch voting does not “control” anything; the final approval authority (mostly vested in the Board) has the control.

Compliance Filing at 21. Since most if not all committee actions require NERC Board approval, this argument would rewrite Section 215(c)(2)(A) to eliminate the requirement that NERC assure “balanced decisionmaking in any ERO committee or subordinate organizational structure,” and allow NERC to ignore Order 672’s directives. Its suggestion that other “mechanisms exist where concerned parties can address the Board” (Compliance Filing at 21) similarly overlooks the statutory directive to provide for balanced decisionmaking at all levels. While the July 20 Order opened the door to

⁶ Indeed, committees can always consult with experts.

achieving balance through “diverse industry experts,” it did not suggest that the statutory balanced decisionmaking requirement was unnecessary because some higher level committee or the NERC board would have the ultimate say.

TAPS recognizes that there may be instances where, despite its good faith efforts, NERC is unable to achieve full representation of every sector because a sector may not choose to participate. But neither the failure of several sectors to participate nor reliance of a diverse group of industry experts should excuse NERC from complying with statutory requirements of balanced decisionmaking – ensuring decisions are not dominated by one or two sectors.⁷

To be consistent with the July 20 Order and the FPA, NERC should be required to modify the original second sentence of Section 1302 as follows:

Committee membership may be unique to each committee, and ~~can~~ shall provide for balanced decision-making by providing for representatives from each sector or, where sector representation will not bring together the necessary diversity of opinions, technical knowledge and experience in a particular subject area, by bringing together a wide diversity of opinions from industry experts with outstanding technical knowledge and experience in a particular subject area.

⁷ Even in a committee with five sectors represented (directly or through diverse industry experts), the “no two sectors can control/no one sector can veto” standard could be satisfied. While Order 672 at P 153 leaves some room for NERC to “adequately explain[] why it cannot comply these principles,” NERC’s Compliance Filing does not come close to supporting decision-making dominated by one or two sectors.

In addition, to ensure the balanced decision-making Section 215 requires, the final sentence should be revised to read:

All committees and other sub-ordinate organizational structures ~~that are established on a sector basis~~ must ensure that no two stakeholder sectors are able to control the vote on any matter, and no single sector is able to defeat a matter.

Respectfully submitted,

/s/ Cynthia S. Bogorad

Robert C. McDiarmid
Cynthia S. Bogorad
Rebecca J. Baldwin

Attorneys for
Transmission Access Policy Study
Group

Law Offices of:
Spiegel & McDiarmid
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

October 2, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of October, 2006, caused the foregoing document to be sent by first-class mail to all parties on the list compiled by the Secretary of the Commission in this proceeding.

/s/ Rebecca J. Baldwin

Rebecca J. Baldwin

Law Offices of:
Spiegel & McDiarmid
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000