

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Council and North American Electric
Reliability Corporation

Docket No. RR06-1-003

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

On October 18, 2006, North American Electric Reliability Council and North American Electric Reliability Corporation (collectively referred to herein as “NERC”) submitted a compliance filing (“Compliance Filing”) to address non-governance issues 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 (“Certification Order”).¹ The Transmission Access Policy Study Group (“TAPS”), an intervenor in the underlying proceeding, largely supports NERC’s filing.² However, TAPS has concerns about NERC’s compliance with the Order’s directives with regard to confidential information. For this reason, pursuant to the Commission’s October 24, 2006 Combined Notice of Filings and Rule 211 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.211, TAPS submits this limited protest.

In its May 4, 2006 Motion to Intervene and Limited Protest (at 30-32), TAPS objected to the confidentiality provisions of NERC’s application as internally inconsistent, overbroad, failing to consistently place the burden to demonstrate

¹ On October 30, 2006, the Commission issued an “Order on Petitions for Rehearing and Clarification; Order on Compliance Filing,” 117 F.E.R.C. ¶ 61,126 (2006), which largely reaffirmed the Certification Order.

² In particular, NERC (Compliance Filing at 40-44, Item 63) addresses violator size and ability to pay in a manner that TAPS can generally support, subject to the comments being submitted today by the American

confidentiality on those seeking to protect allegedly confidential information, and failing to provide a mechanism to challenge the improper designation of material as confidential. The Certification Order required NERC to make changes to address TAPS' concerns, as described below. Although NERC did not seek rehearing on these points, its Compliance Filing fails to comply with the Commission's directives regarding confidential information, and apparently proposes to restrict access to information that is neither confidential nor CEII, contrary to its statutory "openness" requirement. *See* Federal Power Act ("FPA") Section 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D) (requiring ERO rules to "provide for ... openness ... in developing reliability standards and otherwise exercising its duties"). Given the public trust and public interest invested in NERC, the Commission must require NERC to comply with its directives, and provide for access to information not protected from disclosure as confidential or CEII.

A. Scope of Confidential Information Protected

The Certification Order expressed concern about the breadth of the information defined as confidential given what it found to be the public interest in disclosure (at P 399):

Nor does NERC define the categories of information, such as "confidential business and market information including information that is proprietary, commercially valuable or competitively sensitive," that it proposes that the ERO and Regional Entities treat as confidential. We recognize the need for protection from public disclosure of confidential commercial information, for example, because we withhold such information from public disclosure when warranted in response to requests pursuant to the Freedom of Information Act. However, NERC's categorization of particular types of information as confidential or otherwise exempt from public disclosure may be too broad, given, in

particular, the public interest in disclosure of facts relevant to violations of Reliability Standards.

See also Certification Order at P 659 (“NERC’s categorization of the particular types of information as competitively sensitive and thus confidential or otherwise exempt from public disclosure may be too broad.”). It “[t]herefore...direct[ed] NERC to explain in its compliance filing how the ERO and Regional Entities would define specific types of information that must be treated confidentially or as otherwise exempt from public disclosure.” *Id.* at P 400. *See also id.*

Although NERC defines, in Section 1501 of its revised Rules of Procedure (“ROP”), the types of information it intends to keep confidential, those definitions do not address the Commission’s concern that the categorization may be too broad. Most notably, Section 1501(2) provides that “[c]onfidential business and market information means any information which pertains to the interests of any business, which was developed or acquired by that business, and which is proprietary, competitively sensitive, or otherwise valuable.” By largely recycling the same language quoted in the Certification Order (at P 399) and failing to define the new vague term “otherwise valuable,” NERC fails to comply with the Commission’s directive. NERC’s definition could be interpreted to include essentially all information received from any business, even if acquired from the public domain. As discussed in Part C below, NERC has intentionally omitted its previous exclusion (from the confidential information definition) of information in the public domain, disclosed by a third party, or developed by a third

party. *See* Certification Order at n. 242.³ Thus, NERC’s definition of confidential information continues to be too broad “given, in particular, the public interest in disclosure of facts relevant to violations of Reliability Standards.” *Id.* at P 399.

B. Burden to Justify Confidential Treatment

The Certification Order addressed Ameren’s proposal that entities seeking confidential treatment merely state the reason for the claim and postpone demonstration of harm to the time such request is challenged, and TAPS’ request that NERC’s application be clarified to consistently place the burden of showing information merits confidential treatment on those claiming such treatment. *See* Certification Order at P 654, summarizing these concerns. In response, the Commission stated (at P 658):

We disagree with commenters who assert that NERC does not require an entity that seeks to prevent public disclosure of information to show that such information qualifies for such treatment. Section 408.3 of the proposed Rules of Procedure places the burden on users, owners and operators of the Bulk-Power System who assert that specific information is confidential. However, this should be extended to apply to all entities that seek confidential treatment of information. We also believe that the proper time for the entity to make this showing of the need for confidential treatment, in written form, is when the entity provides that information to NERC or a Regional Entity.

NERC has entirely failed to comply with the Commission’s directive. NERC states, in Item 104 of its Compliance Filing (at 68-69), that “new Section 1500 ... addresses these concerns,” but it does quite the opposite. Not only does Section 1500 fail to extend Section 408.3’s burden “to all entities that seek confidential treatment of

³ *Compare, e.g.*, the Protected Materials definition contained in Paragraph 2 of the Commission’s model protective order, available at <http://www.ferc.gov/legal/admin-lit/model-protective-order.pdf>: “Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury” and CEII.

information” as required by the Commission (*id.*); it completely eliminates the requirement, previously contained in Section 408.3, that “[b]ulk power system owners, operators, and users seeking to protect information as confidential have the obligation to demonstrate that the information qualifies for confidential treatment.”⁴ Instead (apparently adopting the Ameren approach rejected in the Certification Order at P 658), NERC requires entities that wish to keep information secret to simply “mark as confidential any document that” they “reasonably believe[] contains confidential information as defined by these rules.” ROP § 1502(1). Section 1500 imposes no obligation to demonstrate that the information qualifies for confidential treatment. No showing whatsoever is required. In contrast, as discussed in Part C below, Section 1503 places a heavy burden on entities requesting information (whether or not confidential).

C. Access to Information that does not Qualify as Confidential or CEII

As quoted above, the Certification Order recognized the importance of public disclosure of information that does not qualify for confidential treatment. The Commission’s directives about clearly defining information that merits “protection from public disclosure” (Certification Order at P 399) assumes availability of information that does not meet the test for withholding. Indeed, in response to TAPS concerns about avenues to challenge such withholding, the Commission instructed NERC to “explain in its compliance filing the basis by which NERC proposes that it and the Regional Entities would determine specific types of information as confidential or as otherwise exempt

⁴ NERC’s Compliance Filing revises Section 408.3 to remove the burden requirement and instead simply cross-references Section 1500. *See* Attachment 2, Redlined Version of NERC’s Rules of Procedure, revised October 17, 2006, at 47.

from public disclosure, including the treatment of settlements.” Certification Order at P 659.

Rather than explaining the basis by which NERC and its Regional Entities will resolve issues as to information claimed to be “confidential or . . . otherwise exempt from public disclosure” as directed by the Certification Order (*id.*),⁵ NERC’s new Section 1500 would deny access to *any* information, whether or not confidential, except to those with a “legal right” to such information.⁶ Section 1503, which deals with “Requests for Information,” applies to *all* information, not just confidential information or CEII. Nor is Section 1503 limited to non-public investigations.⁷ While Section 1505 provides FERC with presumptive access to information, Section 1506 may be read to narrow the information to be filed with this Commission, contrary to Order 672. *See, e.g.*, 18 C.F.R. § 39.7(c)(2).

NERC’s only explanation of its failure to comply with the Commission’s directives regarding confidential information and its decision to resist disclosure of non-confidential information is set forth in Item 59 of its Compliance Filing (at 37-38) (footnote omitted):

In the same legislation that added Section 215 to the Federal Power Act, Congress also stated that the ERO and the regional entities “are not departments, agencies, or

⁵ Section 1503(4) states that the ERO and its RE will make decisions regarding disclosure of “information” (apparently encompassing both confidential and non-confidential information) based on information submitted by the requestor and supplying entity, and any other available information, but provides no standard for disclosure.

⁶ *See* Section 1503(1): “Limitation – A receiving entity shall make information available only to one with a demonstrable legal right to obtain the information from the receiving entity.”

⁷ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 71 Fed. Reg. 8,662 (Feb. 17, 2006), III F.E.R.C. Stat. & Regs. ¶ 31,204 (to be codified 18 C.F.R. pt. 39), *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006), *on reh’g*, Order No. 672-A 71 Fed. Reg. 19,814 (Apr. 18, 2006) III F.E.R.C. Stat. & Regs. ¶ 31, 212.

instrumentalities of the United States Government.” By doing so, Congress has made it clear that neither NERC (as the certified ERO) nor the regional entities are subject to the Freedom of Information Act (“FOIA”) or any comparable provision of law. Thus, there is no presumption of public access to NERC records such as the information that various entities submit to it.

Further, there is no requirement in Section 215 or Order No. 672 that the ERO or a regional entity make any information in its control available to the general public. NERC has not excepted from its definition of “confidential information” information that is “publicly available” or “independently developed.” The fact that the information is publicly or independently available does not place an obligation on a submitting entity or NERC to provide it to the general public. To the contrary, if the same information is available from public sources, then a party seeking that information does not need to obtain it from NERC. Similarly, if it is independently developed, then there is also no reason to request it from NERC.

Thus, NERC’s response to the Commission’s concern about the broad definition of information protected from public disclosure, and its instruction to explain how NERC and its Regional Entities will make confidentiality determinations, is to claim authority to keep *all* information secret. NERC’s new Section 1500 would make all of the Commission’s directives regarding the immunity from public disclosure of confidential information largely irrelevant: if NERC and the Regional Entities are not required to publicly disclose *any* information, it hardly matters what information is designated as confidential (except in the limited instances where it is disclosing information to an entity that can demonstrate a “legal right” to obtain it).

NERC’s proposal also turns upside down Order 672’s requirement (at P 115) that “[t]he ERO or the Regional Entity should review a request for confidential treatment and make a determination if it is reasonable.” Instead of requiring evaluation of the request for confidential treatment, Section 1503(4) of the Rules of Procedure requires that the

ERO or Regional entity review a *requestor's* "legal right" to access information and its proposed use of the information, apparently even if the requested information is not claimed to be confidential.

More fundamentally, NERC's claim that it has no obligation to disclose *any* information to the public is contrary to its statutory obligation to establish rules that "provide for ...openness... in developing reliability standards and otherwise exercising its duties." FPA Section 215(c)(2)(D). *See also* Order 672, 18 C.F.R. § 39.3(b)(2)(iv). Congress and this Commission have expressly recognized that NERC's activities are invested with the public interest, and require public disclosure if they are to earn the public trust the nation has a right to expect. While it may be true that NERC and the Regional Entities are not government agencies directly subject to FOIA, neither are they Sears; they cannot plausibly claim to be mere private corporate entities, "given, in particular, the public interest in disclosure of facts relevant to violations of Reliability Standards." Certification Order at P 399. NERC and the Regional Entities are responsible for implementing federal policy as expressed in FPA Section 215 and Order No. 672. Reliability standards development, monitoring, and enforcement, as well as adequacy assessments, should not take place in the shadows simply because Congress decided to use a self-regulatory organization model subject to "openness" obligations, instead of giving the Commission direct authority.

CONCLUSION

The Commission should require NERC to revise its Rules of Procedure and other documents to comply with the Certification Order's directives regarding confidential

information, and to provide for public access to information that is neither confidential nor CEII, consistent with its statutory openness requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 17 day of November, 2006, caused the foregoing document to be sent by electronic mail or first-class 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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