

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Corporation

Docket No. RR06-1-007

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

Pursuant to Rule 211, 18 C.F.R. § 385.211, the Transmission Access Policy Study Group (“TAPS”) submits this limited protest of the August 6, 2007 compliance filing (“Compliance Filing”) of the North American Electric Reliability Corporation (“NERC”).

On August 6, 2007, NERC submitted its Compliance Filing in response to the Commission’s June 7, 2007 order in the above-captioned docket, 119 F.E.R.C. ¶ 61,248 (2007) (“June 7 Order”). The Compliance Filing addresses, among many other things, the conditions set out in the NERC Rules of Procedure (“ROP”) that requesting entities must satisfy to obtain information from NERC. However, NERC’s Compliance Filing fails to comply with the June 7 Order’s directive regarding requests for information and thereby also violates the related requirements of the Commission’s January 18, 2007 order in this proceeding, 118 F.E.R.C. ¶ 61,030 (2007) (“January 18 Order”).

TAPS therefore submits this limited protest, but would welcome the opportunity to work with NERC to develop an acceptable approach that is consistent with the Commission’s directives.

A. Background

On October 18, 2006, NERC made a compliance filing including a new requirement in its Rules of Procedure that requestors “demonstra[te] legal right” to access information in NERC’s possession. Oct. 18, 2006 NERC Compliance Filing ROP §

1503.1. On November 17, 2006, TAPS objected to that language because the requirement applied to public information, and there is no reason to require a requestor to demonstrate a legal right to public information. The Commission agreed, and in the January 18 Order, ordered NERC to revise the provision, stating that

We intend that NERC and the Regional Entities look with disfavor on frivolous, overly broad or unreasonable requests for information. However, we do not agree that, with respect to activities pursuant to FPA section 215, a person who seeks information from NERC or a Regional Entity must show that it has a “demonstrable legal right” to obtain that information.... Certainly, no one should have to demonstrate a right to obtain information that is public, or that the submitting entity agrees may be disclosed to the requestor.

January 18, 2007 Order at P 193. NERC’s March 19, 2007 compliance filing in response to the January 18 Order amended its ROP to require that a requestor demonstrate a need for, rather than a legal right to, the information.

B. June 7, 2007 Order and Compliance Filing

Following NERC’s March 19 compliance filing, the Commission, in the order that is the subject of the August 6, 2007 Compliance Filing at issue here, instructed NERC to clarify the revised provision. Specifically, FERC’s June 7 Order required that NERC clarify

how NERC and the Regional Entities can differentiate the new requirement [that the requestor demonstrate a need for access to the information] from the prior “demonstrable legal right to access” requirement... [and explain] what showing it or a Regional Entity would require for the new requirement or how a requestor may meet it.

June 7 Order at P 68. In its August 6, 2007 Compliance Filing, NERC states that “the clarification requested by the Commission... is best provided by including additional detail and clarification in the relevant provision of the NERC Rules of Procedure... rather

than through a narrative discussion in this compliance filing.” Compliance Filing at 4.

NERC’s “additional detail and clarification” includes modification of its Rules of Procedure (ROP § 1503.2.2):

The request must identify the individual or entity that will use the information, explain include a statement of the requester’s need for access to the information, explain how the requester and an explanation of how it will use the information in furtherance of that need, and state whether the information is publicly available or available from another source or through another means. If the requester seeks access to information that is subject to a prohibition on public disclosure in the Commission-approved rules of a regional transmission organization or independent system operator or a similar prohibition in applicable federal, state, or provincial laws, the requester shall describe how it qualifies to receive such information.

Id. (blackline version of ROP § 1503.2.2). NERC goes on in the narrative section of the compliance filing to state that it will use the information that the requestor must provide in a balancing test to determine whether the requestor’s need for the information outweighs the providing entity’s interest in preventing disclosure. NERC

anticipates that its response to each request for disclosure of information that has been designated will depend on the particular facts and circumstances associated with the information and the request. However, the information and explanations provided... in a request for disclosure, and the quality of those explanations, will enable NERC to make an informed determination in each case as to *whether the requester’s need for disclosure from NERC outweighs the interests of the entity originally supplying the information in protecting it from disclosure*, as well as to evaluate whether the request for information is “frivolous, overly broad or unreasonable.” Further, in accordance with the directive in paragraph 193 of the January 18 Order on this point, NERC will not require any person or entity requesting disclosure of information to explain how the requester is legally entitled to the information.

Compliance Filing at 4-5 (emphasis added).

The Commission should reject NERC's "balancing test" for making available public information. ROP § 1503.2.2 applies to requests for public information, as the Commission's orders (discussed above) demonstrate. In the case of public information, NERC should not be "balancing" the interest of an entity in keeping public information "confidential" or otherwise protected from disclosure. It is inappropriate for NERC to accord "the interests of the entity originally supplying the information in protecting it from disclosure" any weight at all. Compliance Filing at 5. Thus, the new provisions and associated balancing test are not appropriate when applied to public information.

In addition, NERC's statement that it intends to engage in such balancing contradicts the Commission's January 18 Order that directed NERC to eliminate its "legal right" requirement for disclosure of public information. NERC's March 19 compliance filing, which simply stated, at page 47, that it had replaced the demonstrable "legal right" language with a "demonstr[able] ... need" requirement, certainly didn't suggest that it would balance that need against a non-existent interest in protecting public information from disclosure.

NERC's "balancing test" also fails to comply with the June 7 Order's directive to explain what would be required to meet the demonstrable need test. It is not at all clear from the August 6 compliance filing what kind of showing a requestor would have to make in order to obtain information from NERC or a Regional Entity.

Finally, while TAPS does not object to identifying the persons requesting the information and its intended use, NERC should clarify that a requestor's identification of who is going to use the requested public information and for what purpose is not binding on the requestor, *i.e.*, public information is not provided subject to protective order-type

controls on the use of the information and the persons using it. Such constraints would unduly encumber the beneficial use of public information.

Respectfully submitted,

/s/ Cynthia S. Bogorad

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of August, 2007, 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/ Cynthia S. Bogorad

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