

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Direct Energy Services, LLC	Docket No. RC07-4-000
Sempra Energy Solutions, LLC	Docket No. RC07-6-000
Strategic Energy, LLC	Docket No. RC07-7-000
	<i>Not consolidated</i>

**MOTION TO INTERVENE AND COMMENTS OF
TRANSMISSION ACCESS POLICY STUDY GROUP**

On September 11, 2007, three retail power marketers (collectively, “RPMs”)—Direct Energy Services, LLC (“DES”), Sempra Energy Services, LLC (“Sempra”), and Strategic Energy Solutions (“Strategic”)—filed appeals of decisions of the North American Electric Reliability Corporation (“NERC”) upholding the decision of ReliabilityFirst Corporation (“RFC”) to register the RPMs as Load-Serving Entities (“LSE”).¹ On October 12, 2007, the Commission held a Technical Conference (“Technical Conference”) to address the issues raised by the RPMs’ appeals. Pursuant to the Commission’s September 17² and 18,³ 2007 Notices of Filing in the above-captioned dockets, the October 9, 2007 Notice of Technical Conference and Extending Comment Date (postponing the intervention and comment date for these proceedings),

¹ Appeal and Request for Stay of Direct Energy Services, LLC, Docket No. RC07-4 (Sept. 11, 2007) (“DES Appeal”), *available at* eLibrary Accession No. 20070913-0060; Appeal of Sempra Energy Solutions, Docket No. RC07-6 (Sept. 11, 2007) (“Sempra Appeal”), *available at* eLibrary Accession No. 20070913-0062; Request for Expedited Consideration and Appeal of Strategic Energy, LLC, Docket No. RC07-7 (Sept. 11, 2007) (“Strategic Appeal”), *available at* eLibrary Accession No. 20070913-0064.

² Notice of Filing, Docket No. RC07-6, 72 Fed. Reg. 54,022 (Sept. 21, 2007); Notice of Filing, Docket No. RC07-4, 72 Fed. Reg. 54,021 (Sept. 21, 2007).

³ Notice of Filing, Docket No. RC07-7, 72 Fed. Reg. 54,440 (Sept. 25, 2007).

and 18 C.F.R. § 385.214, the Transmission Access Policy Study Group (“TAPS”) moves to intervene in the three above-captioned dockets and provides comments.

I. MOTION TO INTERVENE

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.⁴ TAPS has many members, both in RFC and elsewhere, whose own members are currently not registered as LSEs because they are not directly connected to the bulk power system, as defined in the Compliance Registry Criteria, or because they have a peak load under 25 MW. Furthermore, as an organization with members in most Regional Entities (“RE”), TAPS has an interest in assuring that the industry and the REs have sufficient guidance from the Commission regarding determinations concerning registration of users, owners and operators of the bulk power system, to ensure that those entities that can have a material impact on the reliability of the bulk power system, and only those entities, are included on the Compliance Registry.

⁴ TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. (“WPPI”). Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; Electricities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

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II. COMMENTS

A. *Introduction*

Given the difficult issues brought to light in the appeal and in the Technical Conference TAPS urges the Commission to require NERC and the REs to apply the Registry Criteria and use reasoned decision-making, as it did in the October 18, 2007 Order on two appeals of FRCC's registry decisions.⁵ Specifically, the Commission should 1) reject NERC's conclusion that "all load" is directly connected to the bulk power system as fundamentally inconsistent with the express terms of the Registry Criteria; and 2) require NERC to make the demonstration required to meet the aggregate impact test contained in the notes to the Registry Criteria. Finally, the Commission should bear in mind the competitive impact of NERC's registration decisions when asked to review such decisions.

B. *Comments*

1. Connection to the Bulk Power System

The definition of "Load-Serving Entity" in the Compliance Registry Criteria is quite broad: "Secures energy and transmission service (and related interconnected operations

⁵ *Mosaic Fertilizer, LLC*, 121 F.E.R.C. ¶ 61,058 (2007).

services) to serve the electrical demand and energy requirements of its end-use customers.”

Compliance Registry Criteria at 4-5. This definition is considerably narrowed, however, by the exemptions; as relevant here, an entity should not be registered as an LSE if it is not “designated as the responsible entity for facilities that are part of a required” under-frequency load shedding or under-voltage load shedding program, or if it is not the case that

Load-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system.

Compliance Registry Criteria § III.a.1.

The question of whether the RPMs’ customers are directly connected to the bulk power system is central to these appeals, but has not been thoroughly discussed either in the RPMs’ appeals or in the Technical Conference. NERC supports registering RPMs based on a finding that “all customer load” is directly connected to the bulk power system. *See, e.g.*, NERC decision on DES appeal, Attachment H to DES appeal, 2. The Commission should reject NERC’s finding and any suggestion that the finding could support registration under the Registry Criteria.

NERC’s attempt to support registration based on the contention that all load is connected to the bulk power system would render half of the Section III.a.1 exemption meaningless, and would, if implemented, likely result in the registration of many small entities that do not in fact have a material impact on the bulk power system. NERC’s contention would be to effectively rewrite Section III.a.1 of the Registry Criteria so that it would simply read: “Load-serving entity peak load is > 25 MW ~~and is directly connected to the bulk power (>100 kV) system.~~” NERC has no authority to revise its Commission-approved Registry Criteria in this manner.

NERC’s contention also conflicts with its definition of the Bulk Electric System. As quoted in the Compliance Registry Criteria, the definition states:

As defined by the Regional Reliability Organization, the electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition.

NERC's contention that all load is connected to the bulk power system is contrary to the 100 kV limitation in the first sentence of the definition. It also fails to consider the applicability of the second sentence – whether the RPM load is connected to the bulk power system by a radial transmission facility serving only load.

The Commission should not permit NERC and RFC to ignore the express terms of the Compliance Registry Criteria accepted by the Commission. NERC and the REs must follow the Registry Criteria. The Criteria were implemented for a reason. If the Criteria are not consistently applied in accordance with the plain meaning of their terms, entities, including the small entities comprising TAPS, will be deprived of the certainty that the Criteria were meant to provide. Order No. 693 at P 33.⁶ Unless NERC and RFC can demonstrate that the RPMs' particular load is directly connected to the bulk power system, the RPMs cannot be registered as LSEs under Section III.a.2 of the Compliance Registry Criteria.

2. Aggregate Impact

NERC has also claimed that RPMs are appropriately registered as LSEs because they might have an aggregate impact on the bulk power system. While NERC may be correct, the “Notes” to the Compliance Registry Criteria require NERC to do more than claim that the

⁶ Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, 72 Fed. Reg. 16,416 (Apr. 4, 2007), III FERC Stat. & Regs. ¶ 31,242 (to be codified at 18 C.F.R. pt. 40), *effective date stayed*, 72 Fed. Reg. 31,452 (June 7, 2007), *aff'd*, Order No. 693-A, 72 Fed. Reg. 40,717 (July 25, 2007), 120 F.E.R.C. ¶ 61,053 (2007).

potential for an aggregate impact exists; NERC or the RE must demonstrate that an aggregate impact does in fact exist (Note 4, emphasis added):

If an entity is part of a class of entities excluded based on the criteria above as individually being unlikely to have a material impact on the reliability of the bulk power system, but that in aggregate *have been demonstrated to have such an impact* it may be registered for applicable standards and requirements irrespective of other considerations.

5/ The reasonableness of any such demonstration will be subject to review and remand by NERC itself, or by any agency having regulatory or statutory oversight of NERC as the ERO (e.g., FERC or appropriate Canadian authorities).

See also Mosaic Fertilizer, LLC, 121 F.E.R.C. at P 37 (expressing Commission “concern[]... that NERC may have defined too broad of an aggregate class” and requiring NERC to provide additional information and explanation).

3. Impact on Competition

Another issue of serious concern is that mechanistic application of NERC standards, particularly if coupled with aggressive application of registration criteria, may have anticompetitive impacts. It was suggested at the Technical Conference that the RPMs’ “host utilities,” who allegedly are capable of performing some LSE functions on behalf of the RPMs’ load that the RPMs cannot perform, refuse to accept compliance responsibility for the RPMs to discourage retail competition. Similar situations might arise with other registered entities with respect to other functions.

While TAPS has no information as to the factual situations underlying these appeals, the Commission should be concerned about a regimen that might subject entities to sanctions for noncompliance with standards with which compliance requires information that is only in the hands of a competitor who has no interest or obligation to cooperate.

At the Technical Conference, RFC distinguished between “legal” and “pragmatic” responsibility, stating that even if one entity, such as the DP for an area, is (from a pragmatic perspective) the best source of particular data and already provides that data to RFC, RFC still lacks authority to (legally) excuse an LSE from providing that same data (unless the LSE can persuade the DP to (legally) assume compliance responsibility for it). Nothing in the new reliability regimen requires enforcement of registration and standards in a manner that fails to consider Section 215’s underlying intent—to achieve reliability without undue impact on competition. Thus, the Commission should bear in mind the competitive impact of NERC’s registration decisions when asked to review such decisions. See FPA § 215, 16 U.S.C. § 824o, which states that the Commission need not defer to NERC in assessing the impact of standards on competition.

CONCLUSION

WHEREFORE, for the reasons stated above, TAPS respectfully requests that the Commission act promptly to grant TAPS's motion to intervene and consider TAPS's comments in reaching a decision in the above-captioned appeals.

Respectfully submitted,

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October 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of October, 2007, caused the foregoing document to be served on all parties on the list compiled by the Secretary of the Commission in these proceedings.

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