

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Council	Docket Nos. RR06-1-012
	RR07-1-002
North American Electric Reliability Corporation	RR07-2-002
	RR07-3-002
Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT	RR07-4-002
	RR07-5-002
	RR07-6-002
	RR07-7-002
	RR07-8-002
Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization	
Delegation Agreement Between the North American Electric Reliability Corporation and Northeast ower Coordinating Council: Cross Border Regional Entity, Inc.	
Delegation Agreement Between the North American Electric Reliability Corporation and ReliabilityFirst Corporation	
Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation	
Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc.	
Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council	
Delegation Agreement Between the North American Docket Electric Reliability Corporation and Florida Reliability Coordinating Council.	
North American Electric Reliability Corporation	

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

Pursuant to Rules 211, 212 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 212 and 214, and the Commission's October 31, 2007 Notice, the Transmission Access Policy Study Group ("TAPS") seeks intervention in this proceeding (to the extent it is not already a party) and submits these comments on the October 30, 2007 compliance filing ("Compliance Filing") of the North American Electric Reliability Corporation ("NERC"). Specifically, TAPS points out three sections of the Compliance Monitoring and Enforcement Program ("CMEP"), Attachment 2 to the Compliance Filing, that, as revised, are unclear, and could lead to unintended and inequitable consequences.

**I. MOTION TO INTERVENE**

TAPS is an intervenor in Docket No. RR06-1.<sup>1</sup> Because the instant compliance filing is noticed in a number of dockets in which TAPS has not sought and obtained intervention, we submit this motion to intervene.

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.<sup>2</sup> TAPS supports fair and effective enforcement of mandatory reliability standards. TAPS members may

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<sup>1</sup> See *N. American Elec. Reliability Corp.*, 121 F.E.R.C. ¶ 61,033, PP 3-4 (2007).

<sup>2</sup> 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.

be affected by NERC's enforcement efforts as to others, and may themselves be subject to reliability enforcement actions.

The interests of TAPS and its members are directly affected by the instant proceeding. TAPS' intervention in this proceeding is in the public interest. TAPS therefore should be granted intervention and made a full party to this proceeding.

Communications regarding these proceedings should be directed to:

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## II. COMMENTS

### A. *Extension of the "Settlement Process" Should Not Impede Issuance of a Notice of Alleged Violation or Undermine Requirements for Disclosure of Settlements*

In the April 19 Order,<sup>3</sup> the Commission directed NERC to "modify section 5.4 to state that settlement negotiations may occur at any time until a notice of penalty is filed with the Commission or an applicable governmental authority." *Id.* P 104. While encouraging settlement is a laudable goal, NERC's implementation of the Commission's directive may have unintended consequences.

Specifically, NERC's modification of Section 5.4 of the CMEP to state that settlement negotiations begin "prior to the issuance of a notice of alleged violation"

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<sup>3</sup> *N. American Elec. Reliability Council*, 119 F.E.R.C. ¶ 61,060 (2007) ("April 19 Order").

creates ambiguity as to whether the initiation of the settlement process can result in postponement of the issuance of a notice of alleged violation or avoidance of such issuance entirely. If settlement discussions could postpone or avoid issuance of notice of alleged violation, the disclosures to NERC and FERC triggered by such notice, as well as other steps and timetables that flow from such issuance, would also be postponed or avoided altogether, frustrating the intended operation of the reliability standards enforcement process.

Further, if settlement discussions are permitted to avoid issuance of a notice of alleged violation, the Commission's clear intent that all settlements must be disclosed (P 105 of the April 19 Order) may be frustrated. Although Section 5.4 requires NERC to "publicly post the violation settled (regardless of whether the settlement includes or does not include an admission of violation)," this disclosure requirement may be evaded if a notice of alleged violation is never issued because of a pre-notice settlement. In such case, NERC may consider that no violation has occurred, thus rendering the disclosure provision inoperable.

To ensure that the enforcement process proceeds as outlined in the CMEP, with the required timely notices to NERC and FERC, and to ensure that the public disclosure requirements are not frustrated, the Commission should require clarification that (1) initiation (and even conclusion) of settlement discussions prior to issuance of a notice of alleged violation will not delay or avoid issuance of the notice; and (2) all settlements must be disclosed, including any settlement reached prior to issuance of a notice of alleged violation.

***B. NERC-Directed Modification of a Regional Entity's Decision Should Fully Reopen the Proceedings***

The Commission ordered that “NERC should be authorized to change a penalty determination on its own motion if a registered entity decides not to appeal. This revision would be warranted, for example, in cases where inconsistency among penalty determinations may otherwise result.” April 19 Order at P 173. In implementing this directive, NERC revised Section 5.6 of the CMEP to state that where NERC directs a Regional Entity to alter a penalty, “any participant may reopen the proceedings on any issue, *irrespective of whether the issue was previously litigated, settled or unopposed*” (emphasis added).

NERC’s compliance filing goes beyond the April 19 Order’s authorization of NERC modification of a penalty. It includes revisions to Section 5.5 providing that in addition to affirming or remanding a decision, NERC “may direct the Regional Entity to revise a decision that clearly conflicts with the goal of consistent national reliability enforcement or where the requirement to revise the decision is necessary for NERC’s oversight of Regional Compliance activities, in which case any participant may reopen the proceedings on any issue.” Section 5.5, however, omits the additional clarifying language included in Section 5.6—“*irrespective of whether the issue was previously litigated, settled or unopposed.*” No explanation of this difference is included in the filing (nor the Order, which did not address or require the change proposed in Section 5.5). There is no reason why a registered entity’s rights to reopen the record should be more restricted in one context (a NERC-modified decision) than in another (a NERC-modified penalty). To avoid confusion from use of inconsistent language, the italicized language from Section 5.6 should be added to Section 5.5.

***C. NERC Modification of a Regional-Entity Accepted Mitigation Plan Should Not Subject the Registered Entities to Violations or Penalties***

Consistent with P 88 of the April 19 Order, NERC revised Section 6.3 to provide that if a mitigation plan is rejected by the Compliance Enforcement Authority or the hearing body, the registered entity shall be subject to findings of violation and sanctions during the period the Mitigation Plan was under consideration. Section 6.5, however, adds a new provision enabling NERC to reject a mitigation plan accepted by the regional entity. This new provision does not address whether, if a regional entity-accepted mitigation plan is rejected by NERC, the registered entity would be subject to violations and penalties for the period during which the mitigation plan was under consideration. The resulting ambiguity could leave a registered entity potentially (and inequitably) vulnerable to penalties in such instances.

TAPS requests that NERC be required to add a sentence to Section 6.5 to clarify that where NERC rejects a mitigation plan previously accepted by a regional entity, the registered entity should *not* be subject to violations and penalties for the period during which the mitigation plan was under consideration by the regional entity and then by NERC. It would be unfair to penalize the registered entity, who in good faith committed to the mitigation plan required by its regional entity, for the regional entity's failure to accurately assess what NERC might demand as a mitigation plan. The situation addressed by the newly added language in Section 6.5 (where NERC rejects a regional entity-accepted mitigation plan) is different and distinct from the situation addressed in P 88 of the April 19 Order (where the registered entity's proposed mitigation plan is never accepted by the regional entity), with equities that warrant protection of the

registered entity that adheres to the instruction of its regional entity. A registered entity should not be punished for the regional entity's error in judgment in accepting a mitigation plan that NERC later rejects.

Thus, Section 6.5 should be revised to expressly state that where a regional entity accepts a mitigation plan, the registered entity will *not* be subject to violation or penalty for the period during which the mitigation plan was pending before the regional entity and NERC so long as the registered entity timely submits a mitigation plan complying with NERC's directives.

### CONCLUSION

The Commission should grant TAPS intervention and require the modifications of the CMEP requested by TAPS.

Respectfully submitted,

/s/ Cynthia S. Bogorad

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November 30, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have on this 30th day of November, 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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