

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Corporation

Docket Nos. RR08-6-000,
RR07-14-001

**MOTION TO INTERVENE OUT OF TIME AND
REQUEST FOR CLARIFICATION OR REHEARING
OF THE
TRANSMISSION ACCESS POLICY STUDY GROUP**

On October 16, 2008, the Commission issued an “Order Conditionally Accepting 2009 Business Plan and Budget,” 125 F.E.R.C. ¶ 61,056 (2008) (“2009 Budget Order”), conditionally approving the 2009 budget of the North American Electric Reliability Corporation (“NERC”). Pursuant to Federal Power Act Section 313, 16 U.S.C. § 825*l* and Rules 214(b)(3) and 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.214(b)(3) and 385.713, the Transmission Access Policy Study Group (“TAPS”) requests leave to intervene out-of-time in this proceeding and requests clarification or, in the alternative, rehearing of Paragraphs 24-25 of the 2009 Budget Order.

I. STATEMENT OF ISSUES

1. Whether the Commission properly altered NERC’s prior, Commission-approved Reliability Standards Development Process. *N. Am. Elec. Reliability Corp.*, Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing, 116 F.E.R.C. ¶ 61,062, P 250 (“Certification Order”), *reh’g granted in part*, 117 F.E.R.C. ¶ 61,726 (2006), *appeal pending sub nom. Alcoa, Inc. v. FERC*, No. 06-1426 (D.C. Cir. filed Dec. 29, 2006); *N. Am. Elec. Reliability Council*, 122 F.E.R.C. ¶ 61,245, *reh’g granted*, 123 F.E.R.C. ¶ 61,276 (2008); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *Entergy Servs. Inc. v. FERC*, 319 F.3d 536 (D.C. Cir. 2003).

II. SPECIFICATION OF ERRORS

1. Whether the Commission erred in altering NERC's prior, Commission-approved Reliability Standards Development Process in the 2009 Budget Order.

III. MOTION TO INTERVENE OUT-OF-TIME

This proceeding is unusual in that the Commission, in a final order on NERC's 2009 budget, made rulings that may be interpreted to alter a series of Commission orders pertaining to the way that broadly-enforceable electric reliability standards will be developed. Although the Commission generally does not accept interventions filed after a final order has been issued in a proceeding, the circumstances here warrant a departure from usual practice. TAPS requests leave to intervene out-of-time in order to raise its own concerns regarding the 2009 Budget Order, and urges the Commission to find that these unusual circumstances constitute good cause for TAPS' failure to intervene prior to this stage of this proceeding. TAPS is willing to accept the record as it stands. Granting TAPS leave to intervene will not disrupt these proceedings or prejudice any party. TAPS raises a single issue for clarification or rehearing.

A. Interests of TAPS

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.¹ Many TAPS

¹ 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 of Ohio; Blue Ridge Power Agency; Clarksdale Public Utilities; Connecticut Municipal Electric Energy Cooperative; Electricities of North Carolina Inc.; Florida Municipal Power Agency; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric; Missouri Public Utility Alliance; Missouri River Energy Services; NMPP Energy; Northern California Power Agency; Oklahoma Municipal Power Authority; and Southern Minnesota Municipal Power Agency.

members participate in the development of and are subject to NERC Reliability Standards.

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IV. REQUEST FOR CLARIFICATION OR REHEARING

The 2009 Budget Order states, at Paragraphs 24-25 (footnote omitted):

24. While NERC relies on volunteer technical experts and stakeholders to develop proposed Reliability Standards under the facilitation of NERC's professional staff, NERC as the ERO is ultimately responsible for both the process and content of Reliability Standards proposed for Commission approval.

25. Thus, the Commission expects that NERC should have or acquire the necessary high level of internal technical expertise to further the development and improve the quality of proposed Reliability Standards. Utilization of industry technical expertise does not discharge the ERO of its obligation to ensure Reliability Standards are developed that are responsive to the Commission's orders and provide for reliable operation of the Bulk-Power System. NERC anticipates over 35 Reliability Standards development projects and needs to be technically fluent about all of these projects to ensure that the development of the standards and NERC's subsequent approval or remand are based on its own technical expertise in addition to that of the industry's used to help draft the standards. Accordingly, the Commission directs NERC to reassess its allocation of FTEs and other resources, such as consultants, budgeted in

2009 for the Reliability Standards program, to provide an explanation in its compliance filing and, if appropriate, to request supplemental funding to support this program.

TAPS understands these paragraphs as instructing NERC to ensure that it has sufficient staff expertise to carry out its responsibilities under its existing Reliability Standards Development Process. TAPS is concerned, however, that this language could be misconstrued as altering NERC's Rules of Procedure and Reliability Standards Development Process. TAPS therefore requests that the Commission clarify that it did not, in Paragraphs 24-25 of the 2009 Budget Order, change any of NERC's existing Commission-approved rules, procedures and processes.

If the Commission did intend to change NERC's rules, procedures and processes in the 2009 Budget Order, TAPS requests rehearing of that decision. The Commission may not reverse its prior orders without stating that it is doing so and explaining its reasons.

NERC's existing rules, procedures and processes that govern how standards are drafted, and by whom, have been approved by FERC. *See* Certification Order, 116 F.E.R.C. ¶ 61,062, P 250; *N. Am. Elec. Reliability Council*, 122 F.E.R.C. ¶ 61,245.

In Order No. 672,² the Commission decided that "the specific proposed Reliability Standard should be developed initially by persons within the electric power industry and community with a high level of technical expertise and be based on sound

² 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. 8662 (Feb. 17, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,204, *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006), *on reh'g*, Order No. 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,212, *modified*, 73 Fed. Reg. 21,814 (Apr. 23, 2008), 123 F.E.R.C. ¶ 61,046 (2008).

technical and engineering criteria. It should be based on actual data and lessons learned from past operating incidents, where appropriate.” *Id.* P 324.

In the Certification Order, the Commission approved “NERC’s proposed development procedures, [under which] the standards committee will appoint a Reliability Standards drafting team with the necessary technical expertise, competencies, and diversity of views to draft Reliability Standards based on sound engineering and technical criteria using actual data and lessons learned from operating incidents.” P 131.

The FERC-approved Reliability Standards Development Procedure (Appendix 3A to NERC’s Rules of Procedure³) explains the process of appointing a Standard Drafting Team in some detail, at 18, stating in part (emphasis added):

Typically, the Standards Committee would direct the conduct of a public nominations process to populate the standard drafting team. ...

... The Standards Committee may accept the recommendations of the standards process manager or may select other individuals to serve on the standard drafting team. *This team shall consist of a group of people who collectively have the necessary technical expertise and work process skills.* The Standards Committee shall appoint the standard drafting team, including its officers. *The standards process manager shall assign staff personnel as needed to assist in the drafting of the standard.*

In other words, the Commission has approved NERC’s process of having standards drafted by stakeholders, with NERC staff assistance “as needed.” The Commission may not reverse that prior approval *sub rosa*. “[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior

³ Available at http://www.nerc.com/files/NERC_Rules_of_Procedure_EFFECTIVE_20080321.pdf.

precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (footnote omitted); *see also Entergy Servs. Inc. v. FERC*, 319 F.3d 536. If, therefore, the Commission wishes (as TAPS does not believe it does) to revisit its assessment of NERC’s rules, procedures and processes as to standards development, the Commission should do so clearly and should explain its reasons.

CONCLUSION

For the foregoing reasons, TAPS requests that the Commission grant its motion for leave to intervene out of time and that the Commission clarify its 2009 Budget Order or, in the alternative, grant rehearing, as set forth above.

Respectfully submitted,

/s/ Rebecca J. Baldwin

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 17th day of November, 2008.

/s/ Rebecca J. Baldwin

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