

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Revision to Electric Reliability
Organization Definition of Bulk
Electric System

Docket No. RM09-18-000

**COMMENTS OF THE TRANSMISSION ACCESS
POLICY STUDY GROUP**

Pursuant to the Commission’s March 18, 2010 Notice of Proposed Rulemaking¹ (“NOPR”), the Transmission Access Policy Study Group (“TAPS”) comments on the Commission’s proposal to (1) direct the North American Electric Reliability Corporation (“NERC”), the Commission-certified Electric Reliability Organization (“ERO”), to revise its definition of the term “bulk electric system” to include all electric transmission facilities with a rating of 100 kV or above; and (2) require that a Regional Entity (“RE”) obtain NERC and Commission approval before exempting any facility rated at 100 kV or above from compliance with mandatory reliability standards. As discussed below, TAPS urges the Commission not to unjustifiably strip NERC and the Regional Entities of their statutory authority and responsibilities and subject entities owning or operating 100+ kV facilities that NERC and the Regional Entities agree should be excluded from the BES to burdensome compliance responsibilities in what could be a lengthy period where an exemption request is pending at the Commission.

¹ Revision to Electric Reliability Organization Definition of Bulk Electric System, 75 Fed. Reg. 14,097 (proposed Mar. 18, 2010), IV F.E.R.C. Stat. & Regs. ¶ 32,654 (“NOPR”).

I. INTERESTS OF TAPS

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.² As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members recognize the need to ensure that facilities that can have a material impact on the reliability of the grid are subject to reliability standards. Except where regional differences make uniformity inappropriate, TAPS supports uniform reliability standards and applicability. At the same time, as owners of transmission facilities with voltages of 100 kV and above that cannot materially impact Bulk-Power System reliability, TAPS members strongly object to the NOPR's proposal to require that each exemption from compliance with reliability standards be approved on a facility-by-facility basis by FERC before the exemption becomes effective.

² TAPS is chaired by Roy Thilly, CEO of WPPI Energy ("WPPI"). Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power, Inc.; 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.

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II. THE COMMISSION SHOULD NOT INTRUDE ON NERC'S STATUTORY ROLE

The NOPR proposes to require NERC to revise the definition of the Bulk Electric System (“BES”). In addition, although NERC and the REs would retain the authority to deny requests for exemptions and to include lower-voltage facilities in the BES without Commission approval, the NOPR proposes to require Commission approval of any exemptions from that definition before such exemptions could become effective. The Commission is making itself the first-line enforcer of the BES definition, rendering NERC and the REs essentially superfluous, and unnecessarily and improperly subjecting entities with 100+ kV facilities that the Regional Entities and NERC conclude should not be part of the BES to burdensome compliance responsibilities.

The NOPR states that “[a]s with Reliability Standards, the Commission reviews and approves revisions to the NERC glossary pursuant to FPA section 215(d)(2). Further, the Commission may direct a modification to address a specific matter identified by the Commission pursuant to section 215(d)(5).” NOPR P 15 n.23 (citations omitted). It is appropriate for the Commission to review the NERC Glossary, like reliability

standards, under Section 215(d), because the definitions in the NERC Glossary, like reliability standards, are developed through NERC's reliability standards development process, drawing on industry expertise, and because reliability standards rely on the Glossary definitions.³ However, in light of the statutory scheme, under which the Commission may approve or remand a reliability standard, but may not draft a reliability standard, the Commission should be wary of encroaching on NERC's statutory role.

Requiring Commission approval of every exemption would also intrude on NERC and the REs' authority over enforcement of reliability standards. Congress assuredly did not intend that the Commission itself undertake a facility-by-facility review to determine which 100+ kV facilities should not be subject to reliability standards, and such Commission micromanagement would be contrary to Section 215's goal of effective and efficient reliability administration. FPA §§ 215(e)(1), (e)(4)(C), 16 U.S.C. §§ 824o(e)(1), (e)(4)(C).

TAPS generally supports the comments of APPA and NRECA regarding the NOPR's undue intrusion on the roles of NERC and the REs. We are commenting separately to highlight and reinforce what we see as a significant problem with the

³ As TAPS and other commenters stated in response to the Commission's Rules of Procedure and Transmission Relay Loadability Orders (*North Am. Elec. Reliability Corp.*, 130 F.E.R.C. ¶ 61,203 (2010); Transmission Relay Loadability Reliability Standard, Order No. 733, 75 Fed. Reg. 16,914 (Apr. 2, 2010), 130 F.E.R.C. ¶ 61,221 (2010)), which, like the BES NOPR, were issued at the Commission's March 18 meeting, Section 215 does not, and was not intended to, give the Commission the authority to dictate the technical content of standards. See Motion to Intervene, Request for Clarification, and, in the Alternative, Request for Rehearing of the Edison Electric Institute, the American Public Power Association, the National Rural Electric Cooperative Association, the Canadian Electricity Association, the Large Public Power Council, the Transmission Access Policy Study Group, and the Electricity Consumers Resource Council, filed in *N. Am. Elec. Reliability Corp.*, Docket No. RR09-6-000 on April 19, 2010 ("Joint Trade Associations Request for Rehearing of ROP Order"); Request for Rehearing and Clarification of American Public Power Association, National Rural Electric Cooperative Association and Transmission Access Policy Study Group, filed in *Transmission Relay Loadability Reliability Standard*, Docket No. RM08-13-001 on April 19, 2010.

Commission overstepping its role. The Commission's disagreement with the NPCC BES definition does not warrant the Commission's undercutting the role of *all* of the Regional Entities, and NERC as well. The record does not support such a decision, nor does the actual situation on the ground. The Commission should not attempt to determine here whether all non-radial-to-load facilities over 100 kV should be considered part of the BES; NERC and the Regional Entities have the local knowledge and expertise to make those determinations.

In this NOPR, as well as in the other reliability orders issued at its March 18 meeting, the Commission appears to believe that NERC and the REs are acting in bad faith or are otherwise incapable of carrying out their responsibilities—in this case, making a credible determination of which, if any, facilities over 100 kV should be exempted. There are no grounds for such a conclusion. While the Commission disagrees with Northeast Power Coordinating Council's ("NPCC") BES definition, NPCC has not been secretive about that definition. Nor are the other seven Regional Entities engaged in a campaign to undermine reliability. If the Commission believes that NERC or the REs are unable to do their jobs, it has a remedy: decertify them.⁴ If not, the Commission should permit NERC and the REs to perform the responsibilities that it has certified them

⁴ 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, 8726 (Feb. 17, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,204, 30,216, P 761, *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); 18 C.F.R. §§ 39.9(a)(2) and (3).

to carry out: enforcing and determining the applicability of reliability standards.⁵

A. *The Commission should not Make All Exemptions Subject to its Approval*

TAPS would not object to a directive to NERC to address the issue of the lack of a uniform definition of the BES, consistent with the existing “general[]” 100 kV bright line set out in the NERC Glossary. TAPS cannot support, however, the proposed procedures for implementing the Commission’s new definition, which are burdensome, inconsistent with the statutory scheme, and wholly unnecessary. The Statement of Compliance Registry Criteria already contains a mechanism for entities to appeal an RE’s registration decision to NERC, and for either the registered entity or the RE to appeal NERC’s decision to the Commission. While there is no automatic review under the Compliance Registry Criteria of an RE decision *not* to register an entity, or that a facility is not part of the BES, the Commission has cited no evidence to suggest that the REs, as a group, are being overly generous in their registration determinations. TAPS members’ experiences suggest the opposite, and the Commission has appropriately reined in some of the Regional Entities when they attempted to reach beyond the Compliance Registry Criteria. *Mosaic Fertilizer, LLC*, 121 F.E.R.C. ¶ 61,058 (2007); *Direct Energy Servs., LLC*, 121 F.E.R.C. ¶ 61,274 (2007).

⁵ The Commission found that NERC satisfied the Section 215 requirements to become the ERO, and that the delegation of ERO authority to each of the Regional Entities was also appropriate under Section 215. FPA §§ 215(c), (e)(4), 16 U.S.C. §§ 824o(c), (e)(4); *North Am. Elec. Reliability Corp.*, 116 F.E.R.C. ¶ 61,062, P 3 (2006) (Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing); *North Am. Elec. Reliability Council*, 119 F.E.R.C. ¶ 61,060, PP 224, 226 (2007) (Order Accepting ERO Compliance Filing, Accepting ERO/Regional Entity Delegation Agreements, and Accepting Regional Entity 2007 Business Plans).

The NOPR's proposal would strip NERC and the REs of authority to grant exemptions (though they would retain the authority to *deny* exemptions and to include lower-voltage facilities),⁶ putting them in the position of simply passing the issue along to the Commission. But the Commission is not the entity with primary, first-line authority under Section 215.⁷ As explained in more detail in the Joint Trade Associations Request for Rehearing of ROP Order, Congress appropriately determined that NERC, not the Commission, should develop reliability standards, and that NERC should be subject to Commission oversight, not Commission micromanagement. As Senator Thomas (R-WY) stated in Senate floor debate in 2002, supporting an amendment that ultimately became the reliability provision of the Energy Policy Act of 2005:

Bulk power system reliability will continue to be managed outside of FERC's hearing rooms unless a problem arises. Then, of course, we can invoke FERC's intervention. That is the way it is designed to be, to start at the grassroots, do the decisionmaking there, and still have the opportunity to go to FERC through the network.

148 Cong. Rec. 3222 (2002) (statement of Sen. Thomas). The record does not support a determination that a problem has arisen in this case that warrants Commission intervention to the degree proposed in the NOPR. The Commission is intended to be the court of appeals in reliability matters, not a beat cop. *See Mosaic Fertilizer, LLC*, 121 F.E.R.C. ¶ 61,058 (2007); *Lee County, Fla.*, 121 F.E.R.C. ¶ 61,143 (2007); *Direct Energy Servs., LLC*, 121 F.E.R.C. ¶ 61,274 (2007). It would be inappropriate and unworkable to

⁶ TAPS presumes that such RE and NERC decisions would be subject to the appeals procedure under the Statement of Compliance Registry Criteria, which is unaffected by this NOPR.

⁷ Section 215(e) plainly contemplates that NERC, and the REs to the extent that authority is delegated to them, are to carry out front-line enforcement of reliability standards; the Commission has independent, not exclusive or even primary, enforcement authority. FPA § 215(e), 16 U.S.C. § 824o(e).

require the police to get court of appeals approval every time they refrained from charging someone; it is equally inappropriate and unworkable for the Commission, as it has proposed, to assert that only it can grant exemptions from application of the BES definition.

Not only is it inconsistent with the statutory scheme for the Commission to usurp NERC and Regional Entity responsibility to determine the applicability of and enforce reliability standards, but such intrusion is not necessary to address any legitimate concerns the Commission may have. If the Commission feels that more oversight over the BES determinations of the REs is necessary, it could institute a periodic reporting requirement to gather the data needed to assess whether NERC and its REs are not worthy of Commission trust to determine whether individual 100+ kV facilities should be excluded from the BES.

III. THE NOPR'S PROPOSED EXEMPTION PROCESS IS UNDULY AND UNNECESSARILY BURDENSOME AND IS NOT JUST AND REASONABLE OR IN THE PUBLIC INTEREST

As explained in more detail in the comments filed by APPA and NRECA, the NOPR's proposed exemption process would be extremely burdensome, especially for those small entities that would be newly registered as a result of the revised BES definition. A small utility that owns and operates one mile of a double-circuited 138 kV line that both its Regional Entity and NERC believe is not appropriately included in the BES would nevertheless face the threat of significant penalties on a per violation, per day

basis for non-compliance with burdensome standards.⁸ Because, as proposed, no exemption would become effective until the Commission approves it, to avoid penalties, such a utility would have to immediately become compliant with the extensive Transmission Owner requirements and very rigorous Transmission Operator requirements, including having 24-hour NERC-certified operators; immediate compliance, of course, is likely to be impossible in many cases, especially with respect to the Transmission Operator requirements. Thus, even if the entity undertakes the time- and resource-intensive process of requesting an exemption from the Commission,⁹ and the Commission ultimately agrees with NERC and the Regional Entity, the small entity would unnecessarily face the very substantial costs of attempting to quickly come into compliance with standards that are not appropriately applied to that entity. Further, given that the Commission has not suggested that its decisions on exemptions be subject to any time limit, the utility might have to remain compliant indefinitely while awaiting a Commission determination on its status.

It is not just, reasonable, or in the public interest for ratepayers to pay the significant costs of compliance, as well as the costs of pursuing a remedy at the

⁸ The NOPR does not discuss whether, if the Commission were to ultimately decide that NERC and the registered entity's RE had correctly determined that a facility was not part of the BES, the registered entity would remain liable for any non-compliance while the exemption was pending before the Commission. Since a Commission approval of an exemption would mean that the facility should never have been included in the BES, penalties should not apply; there is no need for concern that a registered entity with a pending exemption request would not be motivated to comply with reliability standards with respect to the facility at issue because Commission approval of an exemption request is not guaranteed.

⁹ The NOPR states that the Commission contemplates very few exemptions, which presumption is likely to further discourage entities from seeking such exemptions. As APPA and NRECA discuss in their comments, however, the evidence that the NOPR cites in support of granting few exemptions suggests at most that some unknown percentage of 115 and 138 kV facilities are material to reliability, not that all such facilities are.

Commission, for a facility that the utility's Regional Entity and NERC have both determined is not part of the BES.¹⁰ FPA § 215(d)(2), 16 U.S.C. § 824o(d)(2).

Commission micromanagement of which facilities are or are not part of the BES is also inconsistent with "effective and efficient administration of bulk-power system reliability," the standard that governs Commission approval of Regional Entity delegation agreements. FPA § 215(e)(4)(C), 16 U.S.C. § 824o(e)(4)(C).

For the reasons already stated, the Commission should not implement the proposed exemption process. If the Commission nevertheless does so, however, there must at minimum be a transition period. Specifically, the transition plan that the NOPR refers to with respect to NPCC must apply to any facility not previously included nationwide, and it must apply before entities are required to become compliant with respect to new facilities. The NOPR states:

The Commission recognizes that... entities within the U.S. portion of NPCC would likely require a reasonable period of time to ensure that they can comply with mandatory Reliability Standards for previously-exempt facilities. Therefore, the Commission proposes to allow a Regional Entity impacted by the Commission's final rule in this matter to submit a transition plan that allows a reasonable period of time for affected entities within that region to achieve compliance with respect to facilities that are subject to mandatory Reliability Standards for the first time.

NOPR P 27 (footnote omitted). This statement appears to be at odds with the proposal at P 18 that "[o]nly after Commission approval would [a] proposed exclusion take effect."

¹⁰ The NOPR would impose a heavy burden of proof on an entity seeking an exemption from the Commission in spite of prior RE and NERC determinations that the exemption was appropriate. This proposal is inconsistent with the statutory scheme; it amounts to a presumption that NERC and the RE are both incapable of making a factual determination about the grid.

If the Commission implements the NOPR's proposal, it should at a minimum specify that the transition plans referred to in PP 27-28 are to become effective, and thus protect entities from penalties while they become compliant, before the entities are required to become compliant with respect to previously excluded facilities, and thus before the Commission makes determinations about exemptions from the BES. Furthermore, because the effects of the NOPR's proposal would not be limited to NPCC, the transition plan must include all previously excluded facilities that become subject to compliance pursuant to the revised definition, not only those in NPCC.

IV. THE COMMISSION SHOULD CLARIFY THAT RADIALS TO LOAD ARE NOT PART OF THE BES

The NOPR states, at P 19, that “the Commission does not propose to change the ERO’s statement that ‘[r]adial transmission facilities serving only load with one transmission source are generally not included in this definition.’” While earlier paragraphs of the NOPR use over-broad language, referring to including “all” lines over 100 kV (*e.g.* PP 1, 15), we assume that the Commission does not intend to require that radials to load go through the NOPR’s proposed exemption process, since radials to load are not included in the BES definition in the first place. The Commission should clarify this point in any final rule.¹¹ The Commission certainly has provided no basis to subject

¹¹ The precise definition of “radials to load” is properly left to NERC to decide. For example, NERC might reasonably determine that a 138 kV line connecting to the grid a 50 MW load and a 3 MW wind farm at distribution-level voltage or rooftop solar panels, is in essence a radial serving only load, based upon the fact that the generation in question is not itself subject to registration. A contrary determination would subject utilities to registration if they operate small generation behind the meter, or allow net metering behind the second meter, which would needlessly discourage the deployment of valuable renewable generation.

many entities to the onerous exemption process when they are excluded from the BES by the definition's express terms.

V. THE NOPR'S REGULATORY FLEXIBILITY ACT ANALYSIS IS FLAWED

TAPS generally supports the APPA/NRECA comments on the Commission's RFA analysis. The NOPR's RFA Certification, which states that only a few (presumably already-registered) Transmission Owners, Transmission Operators, and Transmission Service Providers in the NPCC footprint would be affected by this rulemaking, is fatally flawed.

CONCLUSION

For the reasons set forth above, the Commission should not implement the NOPR. TAPS supports the suggestion of a “time out” submitted by APPA and NRECA. If the Commission believes it must act now in this area, it should at most impose reporting requirements on NERC and the REs with respect to exemptions that they grant from the BES, so that the Commission can determine whether there is a need for it to intervene further. The Commission should in no event usurp the statutory roles of NERC and the REs based on the current record.

Respectfully submitted,

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