

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability)

Docket No. RR09-6-000

**COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION, EDISON
ELECTRIC INSTITUTE, ELECTRICITY CONSUMERS RESOURCE COUNCIL,
ELECTRIC POWER SUPPLY ASSOCIATION, LARGE PUBLIC POWER COUNCIL
AND TRANSMISSION ACCESS POLICY STUDY GROUP IN SUPPORT OF
COMPLIANCE FILING**

Pursuant to the Commission's Notices in this docket dated December 30, 2010, January 11, 2011 and January 12, 2012, the American Public Power Association ("APPA"), the Edison Electric Institute ("EEI"), the Electricity Consumers Resource Council ("ELCON"), the Electric Power Supply Association ("EPSA"), the Large Public Power Council ("LPPC") and the Transmission Access Policy Study Group ("TAPS") (collectively, "Trade Associations")¹ file these comments in support of the December 23, 2010 Compliance Filing of the North American Electric Reliability Corporation ("NERC" or the "ERO") ("Compliance Filing")² in response to the Commission's March 18, 2010 Order Directing Revisions to Standards Development Procedure ("March 18 Order").

The Trade Associations are united in their view that the Compliance Filing is fully responsive to the Commission's March 18 Order in this docket, as interpreted in the September 16 Order, and that the Compliance Filing takes important steps to preserve the stakeholder consensus-based reliability standards development process that is essential to the integrity of the

¹ With the exception of EPSA, each of the Trade Associations were granted intervenor status in this docket in the Commission's September 16, 2010 Order Denying Rehearing, Denying Clarification, Denying Reconsideration and Denying Request for Stay, 132 FERC ¶ 61,218 at P 17 (2010) ("September 16 Order"). EPSA filed a motion to intervene in the docket on January 11, 2011.

² The Compliance Filing was amended by NERC errata filings in this docket dated January 10, 2011 and January 11, 2011.

reliability standards themselves. Approval of the Compliance Filing would, for the Trade Association signatories below, resolve outstanding issues raised by the March 18 Order.

BACKGROUND

1. The March 18 Order

The March 18 Order directed NERC to modify its Rules of Procedure (“ROP”) to ensure that the ERO is capable of complying with Commission directives issued pursuant to section 215(d)(5) of the Federal Power Act (“FPA”). FPA section 215(d)(5) authorizes the Commission to direct the ERO to submit proposed new or modified reliability standards that address specific matters, if the Commission considers such standards necessary to carry out FPA section 215. Supporting its view that the ROP must be revised, the Commission cited the NERC ballot body’s ability to delay or prevent NERC’s compliance with a Commission directive by voting standards down “if just more than one third of a ballot pool votes against a [r]eliability [s]tandard drafted to comply with a Commission directive.”³ Further, the Commission commented that industry-drafting teams may thwart a Commission directive by failing to develop responsive standards.⁴ Accordingly, the Commission directed NERC to propose “modifications . . . designed to ensure that NERC’s [ROP] allow it to comply with Commission directives. . .”⁵

2. The Trade Associations’ Response to the March 18 Order

The Trade Associations’ response to the March 18 Order was informed by a long history of involvement in the legislation leading to the enactment of FPA section 215, and their appreciation for the delicate balance articulated in section 215. That balance weighs the authority given to the Commission with the responsibility that Congress contemplated would

³ March 18 Order at P 3.

⁴ *Id.* P 4.

⁵ *Id.* P 5.

vest in the ERO for the development of consensus-based reliability standards informed by the substantial expertise of industry participants in the standards development process. FPA section 215(c)(2)(D) specifies that to be certified, the ERO must have rules that “provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties.” It is apparent to the Trade Associations that the legitimacy of the standards promulgated under this statutory scheme depends fundamentally on this open process, administered by the ERO (and carried out through the American National Standards Institute ("ANSI") -certified procedures), subject to FERC’s approval and such directives as the Commission may issue from time-to-time.

The March 18 Order was of concern to the Trade Associations, since it appeared to presage a more active role in standards development for the Commission, diminishing NERC and stakeholder involvement, and suggesting an interest on the Commission’s part in directing the technical content of the standards themselves. In part, the Trade Associations’ concern sprung from their observation that the articulated basis for the Commission’s action – that NERC failed to deliver timely revisions to reliability standard FAC-008-1 – seemed to be an isolated incident in the context of NERC’s good-faith effort to respond to a host of Commission directives. On April 19, 2010, the Trade Associations sought clarification and, in the alternative, rehearing of the March 18 Order, asking the Commission to clarify that its intention was not to specify the technical content of standards.

In its September 16, 2010 rehearing order (September 16 Order),⁶ FERC allayed some of the Trade Associations’ concerns. The Trade Associations take comfort in the Commission’s indication, at PP 46 and 51, that it is not FERC’s intention to dictate the specific content of

⁶ *North American Electric Reliability Corp.*, 132 FERC ¶ 61,218 (2010).

reliability standards. Also reassuring is the Commission's statement at PP 30 and 51 that the ERO may respond to FERC directives with alternatives that are equally effective and efficient in meeting the Commission's articulated concerns.

Nonetheless, without being able to anticipate the outcome of the Compliance Filing in this docket, the Trade Associations petitioned for review of the March 18 and September 16 Orders.⁷

Since issuance of the September 16 Order, the Trade Associations have discussed much of the substance of the Compliance Filing with NERC's senior management and filed extensive comments with NERC on the proposed ROP. For reasons articulated below, the Trade Associations have concluded that the Compliance Filing is fully responsive to the Commission's March 18 and September 16 Orders, and that it takes important steps to preserve the consensus-based stakeholder standards development process that is essential to the balance struck by Congress in enacting FPA section 215.

COMMENTS

1. The Compliance Filing is Fully Responsive to the March 18 Order

The Compliance Filing proposes to add new section 321 to the ROP, providing NERC's Board of Trustees ("BOT") with new authority to employ a group of options to address FERC directives in circumstances where the BOT determines that the standards development process has failed to produce a reliability standard addressing the specific matter(s) identified by FERC.⁸

⁷ D.C. Circuit No. 10-1387, filed November 12, 2010. The appeal has been held in abeyance, by agreement between the Trade Associations and the FERC Solicitor. Included in the group of trade associations joining that appeal (and the April 19 request for clarification or rehearing), but not the instant pleading, is the National Rural Electric Cooperative Association.

⁸ Revised ROP section 309 addresses directives issued by an "ERO governmental authority" in order to encompass directives issued by FERC and by Canadian governmental authorities.

As NERC explains in its Compliance Filing, at pp. 13 – 17, the key features of this new authority are these:

- The BOT can remand a standard to the Standards Committee with specific instructions if the BOT concludes that a proposed standard fails to address a regulatory directive.
- In the event a ballot pool fails to approve a standard addressing a regulatory directive, the BOT may direct the Standards Committee to convene a public technical conference, make revisions to proposed standards to reflect stakeholder input, and re-ballot the proposed standard.
- Following a subsequent ballot, the BOT will be authorized to consider the standard for approval if it meets a 60% approval vote (down from the current two-thirds supermajority requirement), subject to the consideration of written comments the BOT must solicit from stakeholders, and the input at a technical conference the BOT is authorized to hold. Only negative votes with explanations will be counted against the proposed standard in this iteration of the balloting process.
- Upon a written determination that the standards drafting team has failed to develop a standard responsive to a directive, or that the ballot pool has failed to approve such a standard (even at the lower 60% threshold), the BOT, with input from stakeholders (elicited during a 45-day comment period) and NERC staff, may direct the Standards Committee to prepare a draft standard for BOT review and approval. If the Standards Committee fails to deliver such a standard, the BOT may direct NERC management to prepare the standard.
- In circumstances in which the BOT is presented with a draft standard which has not met supermajority approval by the ballot body, the BOT may submit the standard if it determines that it is “just, reasonable, not unduly discriminatory or preferential, and in the public interest, considering (among other things) whether it is helpful to reliability, practical, technically sound, technically feasible and cost justified.” If that determination cannot be made, the BOT may file the standard as a compliance filing with a recommendation that it not be made effective.

The Trade Associations urge the Commission to conclude that these ROP revisions fully respond to the March 18 Order. The revisions plainly address the concern articulated by the Commission⁹ that its directives may be defeated by the negative vote of one-third of the ballot

⁹ March 18 Order at P 3-4.

pool, and that the standards drafting teams may simply fail to develop standards responsive to Commission directives.

Having said that, the Trade Associations further urge the Commission to recognize that the Compliance Filing takes critical additional steps to preserve the consensus-based stakeholder process to the extent feasible. Appropriately, the BOT is authorized to file a proposed standard prepared by NERC management (and without the assistance of the standards drafting team) only as a last resort. And at each step of these alternative procedures, stakeholder input is taken. These procedures are absolutely critical to the Trade Associations' support for the Compliance Filing.

The Trade Associations also emphasize, as NERC acknowledges,¹⁰ that a reliability standard that has neither been prepared by the standards drafting teams nor approved by the ballot pool is not eligible for approval as an American National Standard under ANSI requirements. While ANSI approval is not mandatory, the Commission noted in Order No. 672¹¹ that the ANSI process is a reasonable means to meet the requirements of FPA section 215(c)(2)(D), calling for notice, an opportunity for comment, due process and openness in standards development. The Trade Associations are united in their view that reliance on ANSI-approved processes is fundamental to ensure that critical industry expertise is elicited in the development of high-quality standards. While the Trade Associations support the Compliance Filing to the extent it proposes to circumvent the ANSI process when essential to respond to a

¹⁰ Compliance Filing at 17.

¹¹ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 39, 269 (2006), *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

Commission directive, this support is conditioned on the assumption that this recourse will be undertaken only when absolutely necessary.

2. The Trade Associations Urge the Commission to Exercise its Authority to Issue Directives Judiciously.

While FPA section 215(d)(5) clearly authorizes the Commission to order the ERO to submit proposed reliability standards or modifications addressed to specific matters, the Trade Associations continue to urge the Commission to use this authority judiciously, both with respect to the number and scope of the directives. The structure of FPA section 215 clearly contemplates that primary responsibility for the preparation of proposed standards lies with the ERO. Further, the September 16 Order laudably indicates that it is not the Commission's intention to dictate the specific content of reliability standards.

Forbearance on the Commission's part in this arena is critical. The Trade Associations agree with NERC¹² that an aggressive campaign to use directives to compel the preparation of a large number of reliability standards, and to detail the content of such standards, holds the potential to undermine the ERO and the quality of the reliability standards it produces, and to diminish the Commission's credibility.

3. Approval of the Compliance Filing Will Resolve Outstanding Issues Raised by the March 18 Order.

As noted above, the Trade Associations have filed an appeal of the March 18 and September 16 Orders, which is currently being held in abeyance pending the outcome of the Compliance Filing process. Accepting the Compliance Filing would go a long way towards addressing the concerns that led the Trade Associations to file an appeal of the March 18 and September 16 Orders.

¹² Compliance Filing at p. 11.

CONCLUSION

For the reasons articulated above, the Trade Associations urge the Commission to approve the Compliance Filing without modification.

Respectfully submitted,

AMERICAN PUBLIC POWER ASSOCIATION

Susan N. Kelly
Vice President of Policy Analysis and
General Counsel
American Public Power Association
1875 Connecticut Avenue, NW
Suite 1200
Washington, DC 20009-5715
(202) 467-2933

TRANSMISSION ACCESS POLICY STUDY GROUP

Robert C. McDiarmid
Cynthia S. Bogorad
Rebecca J. Baldwin
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

ELECTRIC POWER SUPPLY ASSOCIATION

Nancy Bagot
Vice President of Regulatory Affairs
Electric Power Supply Association
1401 New York Avenue, NW
11th Floor
Washington, DC 20005

LARGE PUBLIC POWER COUNCIL

Jonathan D. Schneider
Jonathan Trotta
Stinson Morrison Hecker
1150 18th Street, NW
Washington, DC 20036
JSchneider@stinson.com
(202) 728-3034

EDISON ELECTRIC INSTITUTE

James P. Fama
Vice President – Energy Delivery
Barbara A. Hindin, Associate General
Counsel
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 508-5019

ELECTRICITY CONSUMERS RESOURCE COUNCIL

W. Richard Bidstrup
Cleary Gottlieb Steen & Hamilton LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
rbidstrup@cgsh.com
(202) 974-1760

Dated: January 24, 2011
Washington, DC

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 this 24th day of January, 2011.

/s/ Jonathan P. Trotta _____

Jonathan P. Trotta

Law Offices of
Stinson Morrison Hecker LLP