

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Corporation

Docket No. RR15-12-000

**MOTION TO INTERVENE AND COMMENTS OF
AMERICAN PUBLIC POWER ASSOCIATION AND
TRANSMISSION ACCESS POLICY STUDY GROUP**

On June 26, 2015, the North American Electric Reliability Corporation (“NERC”) filed its Petition for Approval of the Revised Pro Forma Regional Delegation Agreement and the Revised Regional Delegation Agreements with the Eight Regional Entities (“Revised RDA Petition”).¹ Pursuant to the Commission’s June 26, 2015 Combined Notice of Filings #2 and Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214, the American Public Power Association (“APPA”) and the Transmission Access Policy Study Group (“TAPS”) move to intervene in this proceeding and submit comments regarding NERC’s Revised RDA Petition.

I. MOTION TO INTERVENE

APPA is the national service organization representing the interests of not-for-profit, state, municipal and other locally owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kWh sales to ultimate customers, and do business in every state except Hawaii. APPA utility members’ primary goal is providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good

¹ Docket No. RR15-12-000 (June 26, 2015), eLibrary No. 20150626-5230.

environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Collectively, public power systems serve over 48 million people. Approximately 282 public power utilities are subject to mandatory Reliability Standards developed and enforced by NERC.

TAPS is an association of transmission-dependent utilities (“TDUs”) in more than 35 states, promoting open and non-discriminatory transmission access.² TAPS members have long recognized the importance of grid reliability. As TDUs, TAPS members are users of the Bulk-Power System, highly reliant on the reliability of facilities owned and operated by others for the transmission service required to meet TAPS members’ loads. In addition, many TAPS members participate in the development of and are subject to compliance with NERC Reliability Standards. TAPS has been actively engaged before this Commission in NERC-related matter since enactment of FPA Section 215 as part of the 2005 Energy Policy Act.

APPA and TAPS members are directly affected by NERC’s Revised RDA Petition, which will affect how NERC will perform its role as the Commission-certified Electric Reliability Organization (“ERO”) through delegation of certain of its functions to its Regional Entities pursuant to the RDAs proposed to be revised. Because of their importance, APPA and TAPS commented on the proposed RDA changes before NERC.³ APPA and TAPS have clear and substantial interests in this proceeding that cannot be

² Duncan Kincheloe, Missouri Joint Municipal Electric Utility Commission, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

³ See Attachment 11 to NERC’s Revised RDA Petition.

represented by any other party, and their participation would be in the public interest.

APPA and TAPS should therefore each be granted intervention.

Communications regarding these proceedings should be directed to:

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II. COMMENTS

From the initial rulemaking implementing FPA Section 215 to the present, APPA and TAPS have been strong supporters of the ERO structure and of NERC as the Commission-approved ERO, with authority to delegate certain of its functions to Regional Entities pursuant to Commission-approved delegation agreements. In reviewing the posted draft revisions, APPA and TAPS were concerned that the proposed changes would significantly weaken NERC's hand in ensuring consistent implementation of the delegated functions, and filed comments with NERC raising concerns about that

apparent dilution of its authority vis-à-vis its Regional Entities.⁴ Among other things, we noted that the then proposed revised RDA substituted a more collaborative relationship between NERC and its Regional Entities for provisions that had provided NERC clear authority to ensure consistent and effective implementation of statutory authority by the Regional Entities. We highlighted the elimination of provisions empowering NERC to review Regional Entity programs and activities for their consistency and sufficiency to carry out the ERO's functions, as well as the required NERC audit of Regional Entities to ensure that the Regional Entity continues to meet all applicable statutory and regulatory requirements prior to renewal, in favor of automatic extension for an additional five-year term (assuming no party provides a one-year termination notice) coupled with an opportunity for NERC to perform periodic reviews.⁵

In response to comments of APPA and TAPS, and others, NERC added Section 3(e):

For purposes of this Agreement, NERC shall collaborate with the Regional Entities in the development of guidance, policies and procedures, and oversight parameters as contemplated by this Agreement. In the event that collaboration is not successful on any such matter, the NERC President may issue a directive with respect to such

⁴ APPA and TAPS' April 2, 2015 Joint Comments are included in Attachment 11 to NERC's filing.

⁵ APPA and TAPS' April 2, 2015 Comments to NERC explained that the currently effective Section 6(j) requires NERC to review each Region's compliance and enforcement program at least once every five years to ensure that all applicable requirements were met both as to the program and in practice, and "the program administered pursuant to the Delegated Authority promotes consistent interpretations across North America of Reliability Standards and comparable levels of sanctions and penalties for violations of Reliability Standards constituting comparable levels of threat to reliability of the Bulk-Power System." Section 8(f)'s existing provision for NERC audits of REs has been removed in favor of supplementing Section 8(e)'s provision for collaborative reviews. Section 12 of the existing delegation agreement allows renewal only after NERC conducts an audit of the RE to ensure the RE continues to meet all applicable statutory and regulatory requirements necessary to maintain the delegation. The proposed RDA automatically extends for five years unless one party provides a one-year notice of termination.

matter pursuant to Section 8 herein, and such directive shall be binding upon [REGIONAL ENTITY].

(Brackets in original). Section 8(c)(i) provides for collaboration with the Regional Entities on the development of such a directive.

APPA and TAPS appreciate the additional provision retaining NERC authority to issue a directive if collaboration is unsuccessful. However, even with this provision, APPA and TAPS remain concerned that the Revised RDA significantly tips the power balance away from NERC and its ability to ensure the consistent implementation of ERO authority that Congress envisioned in allowing for delegation to Regional Entities, and this Commission expected in promulgating Section 215's implementing regulations. As noted in Order 672, P 772,⁶ "The Final Rule establishes that, in general, the Commission oversees the ERO and the ERO oversees any approved Regional Entity." Accord *id.*, P 57. Consistent with that scheme, "The ERO must periodically audit each Regional Entity's compliance with relevant statutory and regulatory criteria for becoming a Regional Entity and performance in enforcing Reliability Standards and report the results to the Commission." *Id.* While discussing Commission audit and reviews of NERC, Order 672 also noted the difference between audits and performance reviews. See PP 773 and 774.

It is instructive that in Order 672, the Commission considered a variety of forms for the NERC-Regional Entity relationship, with some commenters favoring a 'top-down' approach (*see* P 644), while others urged a strong regional organization similar to

⁶ 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. 8,662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006), *on reh'g* 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

the then-existing relationship among NERC and its Regional Reliability Councils (*see* P 645), and still others advocating a “relationship of equals between the ERO and a Regional Entity” (*see* P 646). The Commission was unequivocal in coming down on the side of strong, top-down organization (Order 672, P 654):

The Commission concludes that a strong ERO with primary responsibility for performing all reliability functions is the preferred model for ensuring Bulk-Power System reliability. We believe that having primary authority reside in the ERO is essential in establishing a continent-wide self-regulating reliability organization. It provides for an appropriate level of uniformity in Reliability Standard development and enforcement policies. Section 215(e)(4) of the FPA authorizes the ERO to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the ERO and enforcing Reliability Standards. The statute assumes a strong ERO, which generally will be responsible for all enforcement activities unless and until the ERO delegates its authority. Thus, the ERO retains responsibility to ensure that a Regional Entity implements its enforcement program in a consistent manner and will require a Regional Entity to file periodic reports on enforcement investigations, as specified in the Final Rule’s provisions on Enforcement of Reliability Standards.

Particularly given the challenges inherent in the delegation model and the tasks to be delegated, only with a strong ERO can the Commission achieve the consistency in implementing ERO authority that it has rightfully demanded from the outset⁷ and through the years of implementing Section 215.⁸

Finally, we stress the importance of close Commission scrutiny of the proposed Revised RDA at this juncture. If Section 12(b) of the Revised RDA is approved as

⁷ Order 672, PP 327, 463, 486, 561, 610 (consistent and non-preferential enforcement).

⁸ *See, e.g., N. Am. Elec. Reliability Corp.*, 150 FERC ¶ 61,108, PP 36, 52 (2015) (requiring enhanced transparency to allow measurement of consistency of implementation of NERC’s Reliability Assurance Initiative across regions, and requiring NERC’s annual RAI report to the Commission to address consistency of implementation across regions).

proposed, this proposed automatic extension provision could make this the last time that the RDAs – which form the foundation for the NERC-Regional Entity relationship – are presented to the Commission for review and approval until 2025. Ten years is a long time for a young and still evolving organization with a crucial reliability mission, particularly in light of the required five-year performance reviews for the ERO.⁹ Thus, the proposed automatic renewal considerably raises the stakes to make sure the Revised RDA achieves the strong ERO the Commission intends.

For these reasons, in any order addressing the Revised RDA Petition, the Commission should make clear (either by modifying the proposed revised terms or through interpretation of those terms) its expectation that NERC will exercise its authority under the revised RDAs to ensure NERC and its Regional Entities operate in accordance with the strong ERO scheme established in Order 672, as described above. In addition, and at minimum, the Commission should preserve its ability to review RDAs at the end of the initial five-year term of the Revised RDAs (e.g., by requiring modifications to Section 12(b)).

⁹ See 18 C.F.R. § 39.3(c).

CONCLUSION

For the reasons described above, the Commission should grant APPA and TAPS intervention and take these Comments into account in acting on NERC's Revised RDA Petition.

Respectfully submitted,

/s/ Cynthia S. Bogorad

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July 27, 2015

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 27th day of July, 2015.

/s/ Cynthia S. Bogorad

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