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September 18, 2014

Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: *Physical Security Reliability Standard*, Docket No. RM14-15-000

Dear Secretary Bose:

It has come to our attention that the first page of the Comments of Transmission Access Policy Study Group, as timely filed on September 8, 2014, inadvertently contained a header marking the document as a privileged and confidential draft.

We have enclosed for filing a corrected version that modifies the first page of the Comments to remove the incorrect header from page 1 and add an identification as a corrected version, but is otherwise identical to the originally filed Comments. We apologize for any inconvenience or confusion that this error may have caused. Please contact us if you have any questions. Thank you for your attention to this matter.

Sincerely,

/s/ Cynthia S. Bogorad

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Corrected September 18, 2014

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Physical Security Reliability Standard

Docket No. RM14-15-000

**COMMENTS OF TRANSMISSION ACCESS POLICY
STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) respectfully submits these comments on the Commission’s July 17, 2014 Notice of Proposed Rulemaking (“NOPR”)¹ that proposes to approve, with directives, the Physical Security Reliability Standard, CIP-014-1, submitted by the North American Electric Reliability Corporation (“NERC”).²

TAPS supports the Physical Security standard as proposed by NERC, and urges the Commission to approve the standard without directives. Specifically, TAPS is concerned about the NOPR’s proposal to direct NERC to modify the standard to allow applicable governmental authorities to add or subtract facilities from a Registered Entity’s list of critical facilities. While TAPS appreciates the Commission’s desire to ensure all critical facilities are covered by the Physical Security standard, the NOPR’s proposal to modify the standard is unnecessary and counterproductive. The Commission

¹ *Physical Security Reliability Standard*, 79 Fed. Reg. 43,987 (proposed July 29, 2014), 148 FERC ¶ 61,040 (2014).

² *Petition of NERC for Approval of Proposed Reliability Standard CIP-014-1*, Docket No. RM14-15-000, available at eLibrary No. 20140523-5074 (“NERC Petition”).

already has sufficient statutory authority to add or subtract facilities without modifying the text of the standard. And modifying the standard as proposed by the NOPR would not only upset the regulatory framework that has been in place since 2005, but could also call into question the Commission's authority to enforce other reliability standards that do not specifically state that the Commission can direct the method of compliance.

I. INTERESTS OF TAPS

TAPS is an association of transmission-dependent utilities ("TDUs") in more than 35 states, promoting open and non-discriminatory transmission access.³ As transmission-dependent utilities, 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. Thus, TAPS is sensitive to both the need for standards to support grid reliability, as well as the need to make the standards clear and cost-effective.

³ Tom Heller, Missouri River Energy Services, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

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II. COMMENTS

TAPS appreciates the Commission's need to ensure all critical facilities are included in Registered Entities' critical facilities lists. In the rare event that a Registered Entity's study does not include a necessary facility and the third-party verification process does not result in that facility subsequently being added to the critical facilities list, the Commission should have a mechanism to require that the error be corrected, in accordance with due process. But the NOPR's proposed solution—to insert this mechanism into the Physical Security standard itself—is not an appropriate or effective way to achieve the Commission's objective.

NERC explained in its petition that the proposed standard does not include a procedure for the Commission to modify critical facilities lists because the Commission has existing authority to enforce Reliability Standards and can use that authority to effectively require Registered Entities to add or subtract facilities from their critical facilities lists.⁴ NERC is correct. The Commission does not need explicit language in the

⁴ NERC Petition at 37.

standard to modify critical facilities lists, since it can make such modifications through the established enforcement process.

The NOPR's concern that its enforcement authority would not "guarantee" that a facility would be added to the critical facilities list "in a timely manner, if at all[,]"⁵ is unfounded. Federal Power Act ("FPA") Section 215(e)(3)⁶ gives the Commission authority to direct a Registered Entity to comply with the standard and to impose daily penalties until the Registered Entity complies. That alone should be sufficient authority to ensure Registered Entities quickly add necessary facilities to their critical facilities list. But if the Commission needs to act even more quickly to address an actual or imminent threat, it has additional authority under FPA Section 215(e)(5) to direct NERC to issue a Remedial Action Directive requiring the Registered Entity to add a facility to its critical facilities list.⁷ The combination of the Commission's Sections 215(e)(3) and 215(e)(5) enforcement authorities should allay any credible concern that the Commission cannot require that steps be taken to ensure a necessary facility is included in the critical facilities list.

A. *Section 215(e)(3) authorizes the Commission to order specific methods for Registered Entities to comply with the Physical Security standard.*

The NOPR expresses concern that the Commission's Section 215(e)(3) authority is inadequate to guarantee that a Registered Entity will add a facility to its critical facilities list in a timely manner.⁸ It appears that the Commission is reading its authority

⁵ NOPR, P 23.

⁶ 16 U.S.C. § 824o(e)(3).

⁷ *Id.* § 824o(e)(5).

⁸ NOPR, PP 22-23.

to direct compliance too narrowly. If the Commission finds a Registered Entity's risk assessment study to be inadequate because it lacks a critical facility, the Registered Entity will be in violation of R1 of the Physical Security standard. NERC has explained that an inadequate risk assessment study would violate the standard, and the NOPR agrees.⁹ If a Registered Entity lacks a reasonable and technically sound basis to exclude a facility, there is no dispute that the Commission could find a potential violation. The Commission could then direct a specific method of compliance (i.e., perform your study with assumptions that would add Facility X to your list) and impose daily penalties until the Registered Entity complies.¹⁰ If, despite the threat of penalties, the Commission were concerned about the need for timely action, it could order the Registered Entity to come into compliance within a specified reasonable timeframe.

Registered Entities have strong incentives to comply quickly and fully with such a Commission directive. Registered Entities have a special interest in protecting their own critical facilities. Those facilities that are critical to bulk-power system reliability are the same facilities that are most important to Registered Entities' ability to provide service to their customers. Although the Commission cannot formally exercise its enforcement authority until it concludes (following notice and an opportunity for hearing) that the Registered Entity has engaged or is about to engage in a violation of the Physical Security standard, the vast majority of potential violations are resolved through settlement.

⁹ NERC Petition at 37; NOPR, P 22.

¹⁰ The U.S. Court of Appeals for the District of Columbia Circuit recently held that federal power marketing agencies are not subject to monetary penalties. *Sw. Power Admin. v. FERC*, No. 13-1033 (D.C. Cir. Aug. 22, 2014). Those entities are, nevertheless, still required by the statute to comply with the Reliability Standards and are subject to non-monetary enforcement. *Id.* at 10.

B. Section 215(e)(5) authorizes the Commission to direct NERC to issue Remedial Action Directives in response to actual threats.

Although FPA Section 215(e)(3) provides the Commission ample authority to order Registered Entities to include necessary facilities in the critical facilities lists, there may be occasions when the Commission becomes aware of an actual threat to the reliability of the grid. In those situations, the Commission can use its authority under Section 215(e)(5) to “take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.”¹¹ Rather than ordering a Registered Entity to take action directly, the Commission can use its Section 215(e)(5) authority to order NERC to issue a Remedial Action Directive directing the Registered Entity to add a facility to its critical facilities list.

Remedial Action Directives are part of NERC’s existing Rules of Procedure, and can be issued “at any time” “when such action is immediately necessary to protect the reliability of the Bulk Power System from an imminent or actual threat.”¹² This limitation is consistent with the Commission’s intent to exercise its authority to add critical facilities “only rarely.”¹³ Importantly, NERC does not need to make a finding that the Physical Security standard was violated before issuing the Remedial Action Directive. This makes Remedial Action Directives an effective, if rarely used, backstop mechanism to the Commission’s Section 215(e)(3) enforcement authority.

¹¹ 16 U.S.C. § 824o(e)(5).

¹² NERC Compliance Monitoring and Enforcement Program, Appendix 4C to the Rules of Procedure, § 7.0 (June 25, 2013), available at www.nerc.com/Filings/Orders/us/Rule_of_Procedure_DL/Appendix_4C_CMEP_20130625.pdf (“CMEP”).

¹³ NOPR P 22.

The NERC Rules of Procedure also include necessary due process protections for Remedial Action Directives. NERC must provide specific notice of the factual basis for the Remedial Action Directive, as well as details of the actions needed to comply with the directive.¹⁴ A Registered Entity is entitled to a hearing, but must request one within two days of receiving notice, and may still proceed with implementing the Remedial Action Directive until the hearing process is complete. Hearings on Remedial Action Directives follow an expedited procedural schedule: NERC will hold a prehearing conference within two days; hold a testimonial hearing within seven days of that; and, within ten days of briefing by all parties, NERC will issue a summary written decision.¹⁵ The notice and hearing requirements associated with Remedial Action Directives, which were approved by the Commission,¹⁶ appropriately balance the need for Registered Entities to be given due process while ensuring that actual threats to reliability can be addressed very quickly.

Of course, Remedial Action Directives are not the only tool NERC and the Commission have to respond to actual or imminent threats. For example, the Commission could use its existing authority to direct NERC to issue an alert through the Electricity Sector Information Sharing and Analysis Center (“ES-ISAC”) advising Registered Entities of actions they should take to protect their facilities. Similarly, Section 810 of NERC’s Rules of Procedure authorizes NERC to issue Essential Action alerts that advise Registered Entities of specific actions they should take that are essential

¹⁴ CMEP § 7.0.

¹⁵ CMEP Att. 2 § 1.9. As with other NERC actions, the result of the hearing is subject to appeal.

¹⁶ 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. 8862 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204, *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006), *order on reh’g*, Order No. 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006), *modified*, 73 Fed. Reg. 21,814 (Apr. 23, 2008), 123 FERC ¶ 61,046 (2008).

to ensure the reliability of the bulk-power system. In response to an ES-ISAC advisory or an Essential Action alert, a Registered Entity has strong incentives to take appropriate action—including adding facilities to its critical facilities list—to address threats. There is no reason to think that they would not act swiftly to protect their most important assets.

Ultimately, the Commission’s objective is to have a procedure that would allow it to add or subtract facilities from a Registered Entity’s critical facilities list in the rare event that it “determines through an audit ... or through some other means, that a critical facility does not appear on the entity’s list of critical facilities.”¹⁷ The Commission can achieve that objective using its existing enforcement authority and the procedures that already exist in the regulatory framework. The Commission does not need to reinvent the wheel for Physical Security.

C. The NOPR’s proposed directive is counterproductive.

Given that the Commission has ample authority under FPA Sections 215(e)(3) and 215(e)(5) to ensure a necessary facility is included in a Registered Entity’s critical facilities list, it would be counterproductive to modify the standard to explicitly allow the Commission to modify a critical facilities list. First, modifying the standard as the NOPR proposes is inconsistent with the regulatory framework. Second, modifying the Physical Security standard as proposed calls into question the Commission’s authority to enforce compliance with every other reliability standard that does not explicitly include language authorizing the Commission to direct compliance actions.

The Federal Power Act sets out a clear regulatory framework for protecting the reliability of the bulk power system. Registered Entities, in the first instance, are

¹⁷ NOPR, P 22.

responsible for implementing measures to protect their facilities and coordinate with their neighbors. The ERO, with input from industry, is responsible for developing reliability standards and enforcing compliance with those standards. The Commission serves a critical oversight role over the entire process, with its own backstop enforcement authority. The FPA's reliability framework respects the on-the-ground experience of Registered Entities and the technical expertise of the ERO, while ensuring that the Commission has authority to monitor and enforce actions that will protect grid reliability. This structure has been in place for nearly a decade. The NOPR's proposal to transform the Commission's oversight role into an operational role in the Physical Security standard is inconsistent with the Federal Power Act's well-established regulatory framework.

Not only would the NOPR's proposal upend the existing framework, but it would also do so for only one reliability standard. Implementing a different regulatory paradigm for the Physical Security standard, based on the mistaken premise that the Commission lacks adequate enforcement authority to achieve its goals, undermines the authority the Commission already has under the statute. If the Commission feels that it is necessary to direct a change to the Physical Security standard, it would call into question the Commission's inherent authority to enforce all the other reliability standards that do not explicitly include such procedures. In other words, by explicitly inserting its authority in the Physical Security standard, the Commission could nullify the implicit authority it has in all other standards. Given the Commission's broad statutory authority, there is no need to follow such a hazardous course.

CONCLUSION

For the reasons set forth above, TAPS respectfully requests that the Commission approve, without modification, NERC's proposed Physical Security Reliability Standard.

In particular, the Commission should not adopt the NOPR's proposed directive to modify the standard to include a procedure for applicable governmental entities to add or subtract facilities from a Registered Entity's critical facilities list.

Respectfully submitted,

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