

via e-mail to ROPcomments@nerc.net

**COMMENTS OF TRANSMISSION ACCESS POLICY STUDY GROUP
ON POSTING OF PROPOSED CHANGES TO NERC RULES OF PROCEDURE
DATED JUNE 8, 2020**

TAPS appreciates the opportunity to comment on NERC’s proposed changes to the Organization Registration and Certification Program (“ORCP”) portions of the NERC Rules of Procedure (“ROP”), dated June 8, 2020.¹ The proposed revisions improve on the original, March 12 posting in significant ways, and TAPS appreciates NERC’s acceptance of many of the suggestions TAPS submitted on that earlier posting. The June 8 posting fails to address some of TAPS’ original concerns adequately, and introduces new problems, as described below.

I. BACKGROUND

As part of the Risk-Based Registration (“RBR”) Initiative several years ago, significant changes were made to NERC’s registration procedures, and particularly to Appendices 5A and 5B of the ROP. The RBR Initiative involved extensive consultation between NERC staff and stakeholders, including the work of both the RBR Technical Committee and the RBR Advisory Group. The changes made to the ROP, which were also the product of significant stakeholder consultation, were intended to implement the principles agreed upon. TAPS was actively involved in that process.

II. APPENDIX 5B

A. *Basis for materiality registrations*

TAPS appreciates NERC’s withdrawal of its proposal to delete the materiality test from Appendix 5B. In its restoration of the text of the existing Note 1, however, NERC has made one substantive change: for an entity to be registered despite not meeting the bright-line criteria, the currently effective text requires a demonstration that “the organization is a BES owner, or operates, or uses BES assets, *and* is material to the reliability of the BES.”² (Emphasis added). In the June 8 posting, NERC proposes to eliminate the former requirement, and instead require only a demonstration that “the entity has a material impact on the reliability of the BES.”³ The language proposed for deletion contains a second requirement, independent of the requirement to

¹ NERC Rules of Procedure, Organization Registration and Certification Program, Appendix 5A (June 8, 2020) (“Revised Appendix 5A”); NERC Rules of Procedure, Organization Registration and Certification Program, Appendix 5B, Statement of Compliance Registry Criteria (June 8, 2020) (“Revised Appendix 5B”). Unless otherwise specified, all citations to “Revised Appendix 5A” or Appendix 5A revisions, generally, cite to the version posted June 8, 2020. Likewise, unless otherwise specified, all citations to “Revised Appendix 5B” or Appendix 5B revisions, generally, cite to the version posted June 8, 2020.

² NERC Rules of Procedure, Organization Registration and Certification Program, Appendix 5B, Statement of Compliance Registry Criteria (October 31, 2016) (“Appendix 5B”) at 9 (*emphasis added*).

³ Revised Appendix 5B at 10.

demonstrate materiality; it is not empty verbiage. NERC has not justified making such a substantive change to the existing, FERC-approved text. Moreover, under Section 215 of the Federal Power Act, 16 U.S.C. § 824o, NERC *may not* register an entity that does not use, own, or operate BPS assets, regardless of that entity’s materiality to reliability.⁴

B. *Pre-established sub-set lists*

TAPS appreciates NERC’s proposal to retain, with minimal changes, the text of the existing Note 5, which provides for limiting a registered entity’s compliance responsibilities to a sub-set list of Reliability Standards, either pursuant to pre-established criteria (e.g., UFLS-Only Distribution Providers (“DP”)) or on a case-by-case basis.⁵ NERC also, however, proposes to add a sentence stating that in the case of pre-established sub-set lists, “the eligibility criteria and sub-set list of applicable Reliability Standards shall be set forth on the NERC website.”⁶ While TAPS agrees that it is appropriate for Appendix 5B to state where such criteria can be found, it is *not* appropriate to simply place them “on the NERC website”; they belong in Appendix 5B. NERC has not explained why it contemplates treating future pre-established sub-set lists differently from UFLS-Only DP, which is part of Appendix 5B.

For the sake of transparency and accountability, criteria and applicable standards for pre-established sub-set lists should be subject to the industry consultation and FERC approval required for ROP changes. In addition, *all* criteria applicable to registration determinations belong in Appendix 5B.

C. *UFLS-Only Distribution Providers*

Currently, Appendix 5B states at Section III(b):

The Reliability Standards applicable to UFLS-Only Distribution Providers are: (1) PRC-005,⁷ PRC-006-1, PRC-006-2 and (2) any regional Reliability Standard whose purpose is to develop or establish a UFLS Program [PRC-006-NPCC-1 and PRC-006-SERC-01]. Reliability Standards that apply to Distribution Providers will not apply to UFLS-Only Distribution Providers, unless explicitly stated in the applicability section of these Reliability Standards and in future revisions and/or versions.

⁸ Four versions of PRC-005 are currently in various stages of Commission approval and standard development. For the period that each is in effect, PRC-005-2(ii), PRC-005-3(i), PRC-005-3(ii), PRC-005-4, PRC-005-5, and PRC-

⁴ 16 USC § 824o(b)(1).

⁵ Appendix 5B at 10.

⁶ Revised Appendix 5B at 10.

005-6 will apply to an entity included on the NCR as a UFLS-Only Distribution Provider during that period.

That text, like the UFLS-Only DP category itself, was added to Appendix 5B as part of the Risk-Based Registration Initiative (“RBR”). The intent was that subsequent versions of the listed standards would add UFLS-Only DP to their applicability sections, thus rendering the quoted text obsolete. And indeed, a revised version of PRC-006 that explicitly adds UFLS-Only DP is pending FERC approval,⁸ and a recent SAR proposes to add UFLS-Only DP to PRC-005.⁹

Despite this history—and despite comments by NERC staff to the effect that UFLS-Only DP is now no different from any other registration category—NERC proposes to revise the quoted text to make “any applicable versions” of PRC-005 and -006 applicable to UFLS-Only DPs.¹⁰ It is inappropriate for the ROP to dictate the applicability of future versions of standards. NERC should instead simply update the version numbers as appropriate, pending full transition to the updated versions.

If a Standards Drafting Team (“SDT”) decides that UFLS-Only DPs should not be in a new version of PRC-005 and/or -006—if, for example, stakeholders decide to consolidate UFLS-Only DP requirements in a separate standard, or if they believe they can support reopening FERC’s determination that UFLS-Only DPs should be subject to those standards—the SDT is permitted to propose such a change, and stakeholders are permitted to approve it. But if the ROP dictate a particular outcome, that permissibility will be less clear; and if such a change *is* approved through the standards development process, there will be a conflict between the ROP and the standards.

D. Accuracy of conforming edits

The existing Summary section of Appendix 5B states:¹¹

Organizations will be responsible to register and to comply with approved Reliability Standards to the extent that they are owners, operators, and users of the Bulk Power System (BPS), perform a function listed in the functional types identified in Section II of this document, and are material to the Reliable Operation of the interconnected BPS as defined by the criteria and notes set forth in this document.

⁸ <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15468690> at 7.

⁹ NERC Project 2019-04, Modifications to PRC-005-6, Standard Authorization Request at 2 (June 2, 2020) (available at [https://www.nerc.com/pa/Stand/Project%20201904%20Modifications%20to%20PRC0056%20DL/2019-04 Modifications to PRC-005 SAR Clean 06022020.pdf](https://www.nerc.com/pa/Stand/Project%20201904%20Modifications%20to%20PRC0056%20DL/2019-04%20Modifications%20to%20PRC005%20SAR%20Clean%2006022020.pdf)).

¹⁰ Revised Appendix 5B III(b). We assume for the sake of this discussion that the intended meaning is “any currently-effective versions,” but note that stating that UFLS-Only DPs are subject to “any *applicable* versions” of PRC-005 and -006 would be circular.

¹¹ Appendix 5B at 1 (*emphasis added*).

In its original posting of these proposed changes,¹² NERC had proposed to delete the underlined text. In response to comments pointing out that entities' materiality to reliability is defined by Appendix 5B, NERC now proposes to delete only the words "and notes" from that sentence:¹³

Organizations will be responsible to register and to comply with approved Reliability Standards to the extent that they are owners, operators, and users of the Bulk Power System (BPS), perform a function listed in the functional types identified in Section II of this document, and are material to the Reliable Operation of the interconnected BPS as defined by the criteria ~~and notes~~ set forth in this document.

This is appropriate in the limited sense that there is no longer a section called "notes." But the sections now proposed to be titled "Determination of Material Impact" and "Limitation of responsibilities to a sub-set of Reliability Standards,"¹⁴ despite not being "criteria,"¹⁵ are part of what "define[s]" entities' materiality. We therefore suggest that NERC assign a section number or numbers to the two new notes-as-sections, and revise the sentence to read "...are material to the Reliable Operation of the interconnected BPS as defined in Sections I-[V or VI] of this document."

III. APPENDIX 5A – ORGANIZATION REGISTRATION AND CERTIFICATION MANUAL

A. Burden of proof and evidentiary standard

TAPS believes that NERC's proposed revision and simplification of the existing language with respect to the burden of proof in Panel reviews is for the most part substantively identical to, and more straightforward than, the existing language. The proposed expression of the rule that the Regional Entity has the burden of proof with respect to application of the bright-line criteria and the criteria for pre-established sub-set lists, however, is unclear. The first sentence of NERC's proposed revision—"The burden of proof is on the applicant that makes the request for a Panel review"—is inaccurate, since in the two cases noted above, the burden is *not* on the entity that requests Panel review.¹⁶ The current phrasing makes those exceptions at best an afterthought. Instead, we suggest that NERC's revised text be further revised as follows:

¹² NERC Rules of Procedure, Organization Registration and Certification Program, Appendix 5B, Statement of Compliance Registry Criteria (March 12, 2020) at 1.

¹³ Revised Appendix 5B at 2.

¹⁴ *Id.* at 10.

¹⁵ NERC's proposed revisions to Appendix 5A consistently refer to the materiality test being used to determine whether entities that do not meet "the criteria set forth in Appendix 5B" should be registered, or whether entities that do meet those criteria should not be registered. If the materiality test were itself part of the Appendix 5B "criteria," Appendix 5A would require extensive conforming changes.

¹⁶ Revised Appendix 5A § III(D)(2)(c).

The burden of proof is on the applicant that makes the request for a Panel review, except that regardless of the identity of the applicant, the applicable Regional Entity bears the burden of proof in: ~~However there are two instances where the burden of proof is on the applicable Regional Entity. These two instances include:~~ 1) disputes regarding application of Sections I through IV of the Registry Criteria, and 2) disputes where NERC has (i) established clearly defined criteria for eligibility for a sub-set of applicable Reliability Standards (which may specify Requirements/sub-Requirements) and (ii) identified similarly situated entities that the sub-set list may apply to.

NERC proposes to retain the statement from the currently effective Appendix 5A that “The standard of proof in any proceeding under these procedures shall be by a preponderance of the evidence.”¹⁷ This is appropriate, and consistent with the existing burden of proof. NERC also proposes, however, to revise the first sentence of the prior subsection:¹⁸

The Panel will evaluate all documentation, assessments, and responses submitted to determine whether the weight of the evidence either supports or does not support granting the applicant’s request ~~as the basis for its decision.~~

This proposed new language is directly at odds with the stated evidentiary standard and allocation of the burden of proof, in that it suggests that the requesting entity always bears the burden of proving that “the weight of the evidence . . . supports . . . granting [its] request.”¹⁹ Even if the language were revised to restate the evidentiary standard accurately, in its current location it fails to serve the purpose for which it was requested, i.e. clarifying the Section III(D)(8) evidentiary standard for non-lawyers. This proposed change should be reversed. Appendix 5A sets forth administrative procedures; in this context, clarification of the meaning of “preponderance of the evidence” is neither necessary nor appropriate.

B. Entity responsibilities pending Panel review

In its original posting of these proposed changes, NERC had proposed²⁰ to delete a subsection (current Section III(D)(5)(a)), which states that:

To ensure there is no confusion with respect to the rights and responsibilities of a Registered Entity during the panel review

¹⁷ NERC Rules of Procedure, Organization Registration and Certification Program, Appendix 5A (October 31, 2016) (“Appendix 5A”) at § III(D)(6)(d); Revised Appendix 5A § III(D)(8).

¹⁸ Revised Appendix 5A at § III(D)(7).

¹⁹ *Id.*

²⁰ NERC Rules of Procedure, Organization Registration and Certification Program, Appendix 5A (March 12, 2020) (“March 2020 Revised Appendix 5A”) at 17.

process, the notification [of receipt of a request for Panel review] will confirm whether the Registered Entity will remain on the NCR and will be responsible for compliance with approved Reliability Standards applicable to the function under review.

TAPS objected, pointing out that NERC proposed to keep the parallel language in Section VI with respect to registration appeals, and that this clarification of status is important with respect to both Panel reviews and appeals. In its June 8 posting, NERC proposes to state instead that “Unless informed otherwise in NERC’s notice of a valid request, the entity whose status is at issue will have their current responsibilities for compliance with approved Reliability Standards in effect until the issue at hand has a final determination.”²¹ The proposed new language improves on the currently effective language by recognizing that at the Panel review stage the entity whose status is at issue will not necessarily be on the NCR. TAPS requests, however, that NERC retain the existing requirement that the Panel include a statement as to entity responsibilities in every notification of receipt of a Panel review request; NERC has not justified abandoning the Panel’s current obligation to make an explicit decision on this issue with respect to each request. In addition, relying on a default stated only in Appendix 5A creates the risk that a newly registered entity whose previous contact with NERC has been limited might assume that submitting a request for Panel review automatically stays its compliance obligations.

C. Flowcharts

NERC had proposed, in its original posting of these proposed changes, to delete the flowcharts at the end of Section III.²² In response to TAPS comments opposing this proposed deletion, NERC now proposes to delete *all* of the flowcharts from Appendix 5A, stating that it is doing so “to avoid confusion as the language within the Appendix govern the procedures, and the flowcharts were not aligned with the language of the Appendix. Also, there are no other flowcharts within the ROP or other Appendices.”²³ TAPS agrees with NERC that the language of Appendix 5A governs the procedures; flowcharts, however, provide an important aid to comprehension. There is no need to throw the baby out with the bathwater; to the extent that the flowcharts are inconsistent with the language of Appendix 5A, or are incomplete, the flowcharts can and should be revised and supplemented. TAPS would be happy to assist in a review and revision of the flowcharts for Sections III and VI. To avoid any confusion, NERC could append to each flowchart a disclaimer noting that the flowcharts are provided for informational purposes only, and that in the event of a conflict between the flowchart and the text of the Appendix, the text controls.

The fact that other Appendices do not include flowcharts is irrelevant to the question of whether this Appendix should do so.

²¹ Revised Appendix 5A § III(D)(5)(a).

²² March 2020 Revised Appendix 5A at 19-20.

²³ NERC Rules of Procedure, Rules of Procedure Changes to Section 500 and Appendices 2, 5A, 5B, and 5C Pertaining to the Organization Registration and Certification Program, Consideration of Comments (“Consideration of Comments”) at 29.

D. Panel review “applicant”

NERC proposes to refer to the entity that submits the request for Panel review as the “applicant” throughout Section III(D). While TAPS supports the use of consistent terminology, we are concerned that the particular term selected may be confusing. Subsection III(A) deals with “Registration application[s]”;²⁴ NERC’s proposed changes would thus result in there being two types of “applicant” in Section III. The Section III(A) “applicant” will always be the entity whose status is at issue, while the entity requesting Panel review under Section III(D) may be either the entity whose status is at issue or the Regional Entity. This problem is compounded by the fact that the request for Panel review is referred to as a “Request Form,” not an “application.” Section III(D)(2). To avoid any confusion in cases where the Regional Entity submits the request for Panel review, we suggest that NERC use the term “requesting entity” in place of “applicant” in Section III(D).

²⁴ Revised Appendix 5A § III(A)(1).