

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Rules Concerning Certification of the Electric)
Reliability Organization; and Procedures) Docket No. RM05-30-000
for the Establishment, Approval, and)
Enforcement of Electric Reliability Standards)

**COMMENTS OF
THE ISO/RTO COUNCIL
ON PROPOSED REGULATIONS**

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October 7, 2005

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The ISO/RTO Council (“IRC”)¹ respectfully submits its comments on the regulations proposed by the Commission to implement section 215 of the Federal Power Act (“FPA”), as added by the Electricity Modernization Act of 2005, concerning mandatory reliability standards.

¹ The nine functioning Independent System Operators (“ISOs”) and Regional Transmission Organization (“RTOs”) in North America formed the IRC in April 2003. The IRC’s mission is to work collaboratively to develop effective processes, tools and standard methods for improving competitive electricity markets across North America. In fulfilling this mission, it is the IRC’s goal to provide a perspective that balances reliability standards with market practices so that each complements the other. The IRC is comprised of the Alberta Electric System Operator (“AESO”), California Independent System Operator Corporation (“CAISO”), the Independent Electricity System Operator of Ontario (“IESO”), ISO New England, Inc. (“ISO-NE”), Midwest Independent Transmission System Operator, Inc. (Midwest ISO”), New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, LLC (“PJM”), the Electric Reliability Council of Texas (“ERCOT”), and the Southwest Power Pool (“SPP”). The AESO and IESO are not subject to this Commission’s jurisdiction. While the AESO and IESO concur with these joint comments of the ISO/RTO Council, this concurrence should not be construed as agreement or acknowledgement that their organizations are subject to this Commission’s jurisdiction. ERCOT is submitting separate comments under this docket and has elected not to be a signatory to these joint comments of the ISO/RTO Council.

Certain of the members of the IRC may submit individual comments as well addressing additional issues specific to their respective regions.

I. INTRODUCTION

The IRC supports the development of clear and enforceable international reliability standards. The lack of clear standards in the past has helped contribute to concerns with enforceability, and consistency among regions. Moreover, a lack of clearly defined roles between the electric reliability organization (“ERO”), regional entities, RTOs/ISOs, and other control area operators can only work to further confuse an already crowded playing field. The IRC’s comments will help the Commission ensure clearly defined roles for *all* entities charged with ensuring reliability, as well as provide an analytical tool for resolving the tension in the Notice of Proposed Rulemaking (“NOPR”) concerning issues associated with North American vs. regional standards and the interplay between approved tariff provisions and new reliability standards.

The key to assuring a workable regime for managing the reliability of the North American bulk power system lies in certain key principles:

1. **Ensure Clear, Internationally Applicable Standards**---To ensure that reliability standards are truly international in scope and capable of enforcement across three countries, they should clearly reflect the “what” not the “how” of reliability. In short, the ERO’s role should be to promulgate standards and impose appropriate sanctions for violations. Implementation of the standards should be left to control area operators and system planners, including RTOs and ISOs, in accordance with their approved tariffs and detailed operating procedures.

2. **Develop Non-Discriminatory Standards Adaptable to All Regions**---Clear North American standards also should be neutral in their impact on areas with organized markets and areas without such markets. If standards are neutral in their market impact,

and do not attempt to mandate the manner of implementation, then concerns about regional standard-setting, and how to ensure consistency, will largely disappear.

3. **Clearly Define Roles by Differentiating between the ERO's or Regional Entities' Promulgation vs. System Operators/Planners' Implementation of Standards Pursuant to Tariffs**---

The Commission also should ensure that roles are clearly defined to avoid creating confusing and potentially overlapping layers of regulation. The ERO's and regional entities' role should be to promulgate clear standards and administer consistent sanctions for violations of the standards. The RTO's and ISO's role is to *implement*² the standards in accordance with their approved tariffs and operating procedures.³ RTO and ISO implementation of such standards takes into due consideration the specific characteristics of the bulk power system subject to their operation, the unique issues requiring coordination with abutting areas of the bulk power system (whether in Canada, the United States or Mexico), and the advice of affected stakeholders through the RTOs' and ISOs' inclusive processes. This proposed delineation of roles is comparable to the appropriate division of responsibilities today

² An analogy may be appropriate here. Legislatures set speed limits, and police departments and courts enforce those speed limits. However, the actual details of driving (e.g., whether or not one uses "cruise control" to drive on an interstate highway) are left to vehicle operators. By the same token, the ISOs/RTOs and other control area operators are the vehicle operators who must operate within those parameters.

³ FPA section 215 clearly envisions an important implementation role for ISOs and RTOs, as it provides a special procedure to resolve conflicts between reliability standards and any ISO/RTO function, rule, or tariff provisions, affirming that such function, rule, or tariff provision must remain in place until the Commission finds that a conflict exists and that it should be resolved by a change to such RTO/ISO provision, rather than by a change to the standard. See FPA section 215(d)(6).

among the North American Electric Reliability Council (“NERC”), the regional reliability councils (or their delegates) (“RRCs”), and the ISO/RTOs, as follows:

CURRENT DIVISION OF RELIABILITY REPOSNSIBILITIES

NERC (What)	RRC	RTO/ISO (HOW)
<ul style="list-style-type: none"> · Develops consensus standards for all of North America · Delegates to RRC the responsibility and authority for monitoring compliance to the NERC standards · Delegates to the RRC the responsibility and authority for enforcing the penalties and sanctions for non-compliance to NERC standards · Conducts audits of its Balancing Authorities, Transmission Operators, and Reliability Coordinators to ensure that they have the necessary tools to be compliant with the NERC standards 	<ul style="list-style-type: none"> · Monitors its entities for compliance with standards · Enforces the penalties and sanctions on entities within its area for non-compliance · Develops regional input to standards and policies 	<ul style="list-style-type: none"> · Implements practices, rules, markets, and procedures to ensure compliance with the standards · Enforces its own rules and implements penalties or sanctions (such as non-market participation) when its members do not follow the RTO/ISO rules

4. **Provide Definitive Criteria for Determining Whether a Standard Is Just and Reasonable** ---The Commission should set forth clear criteria as to how it will judge the justness and reasonableness of a proposed standard. The IRC sets forth eight specific criteria (at pages 14-15 of these comments) that the Commission should review in applying the just and reasonable standard.

5. *Where Justified, Individual Regions Should Be Authorized to Have Reliability Rules that Are More Stringent than, but Consistent with, ERO Standards* ---

Finally, the Commission should not interpret the Electricity Modernization Act as requiring it to prohibit individual regions from having rules that are more stringent than, but also consistent with, ERO standards. To do so would be to construe the Act, which was intended to enhance reliability, as forcing some regions to have weaker standards than they do today. Conversely, it would be no solution to require, in the name of standardization, that all regions must adopt more rigorous requirements that were designed for some other regions, whether or not those stricter standards are needed in all regions.

Accordingly, where clearly justified to support specific, identifiable regional needs, regional standards (including more stringent standards) should be allowed. By the same token, the Commission should make clear that the regional standards that it and the ERO will accept will not become a ready substitute for properly formulated international standards.

II. COMMENTS ON SPECIFIC PROVISIONS

**A. Section 38.3 – How Should the Commission Define “End-Users” for Purposes of the Statutory Requirement that The ERO Must Establish Rules that “Allocate Equitably” its Charges “Among End-Users?”
NOPR at P 43.**

The IRC supports use of net energy for load as the appropriate measure for allocating the costs of the ERO. Loads are the ultimate beneficiaries of system reliability, and therefore are properly allocated the costs of the reliability organization. Moreover,

load should be assessed for purposes of the statute whether that load is in a bundled state rather than an unbundled state, or in a traditional vertically integrated utility service territory rather than an ISO/RTO region. Congress provided the Commission with authority over “all users . . . of the bulk-power system.” FPA section 215(b)(1). Exempting some bundled loads based on location would impose a disproportionate share of ERO costs on ISO/RTO regions, and thus effectively penalize entities that choose to participate in ISOs/RTOs.

This concern stems from the ISOs/RTOs’ experience with the Commission’s existing rules for allocating the annual fees that fund its regulatory programs under Order No. 641.⁴ Under this regime, market participants in ISO/RTO regions pay higher assessments than those in non-ISO/RTO regions. In Order No. 641, the Commission eliminated the requirement that wholesale market sales be subject to the annual charges; instead, Order No. 641 mandated that electric program costs be allocated entirely on the basis of reported transmission service volumes. The Commission concluded that nearly *all* retail sales within ISO/RTO regions would be reflected in the unbundled transmission volumes reported. Meanwhile, only *unbundled* retail sales would count in the formula for loads outside of ISO/RTO regions. In the IRC’s view, this rule meant that ISO/RTO members subject to the annual electric program charges would be allocated a disproportionate share of the costs. The Commission here has an opportunity to develop a funding mechanism that fairly and rationally allocates costs among all affected entities, and the IRC urges it to do so in the final rule.

⁴ Revision of Annual Charges Assessed to Public Utilities, Order No. 641, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,109 (2000), reh’g denied, Order No. 641-A, 94 FERC ¶ 61,290 (2001).

Moreover, transmission facility owners and operators should not be allocated a share of ERO costs, except to the extent they also act as load-serving entities. Facilities do not exist for their own right, but to serve loads. If transmission owners and operators were to also be assessed, end users could face paying twice for the reliability functions of the ERO and the regional entities—once through charges assessed against an RTO/ISO, an ITC, or the transmission function of a vertically integrated company, and a second time through an assessment against their load serving entity. To avoid this potential double count, end users should be assessed through their load serving entity. This would not preclude, however, an ISO or RTO acting as a billing agent for ERO charges, to take advantage of existing settlement systems. Such settlement logistics should be left to the involved parties to arrange as appropriate.

B. Section 38.4 – Approval of Reliability Standards

1. Deference to Regional Standards

FPA section 215(d)(2) provides that the Commission is to give “due weight” to the technical expertise of the ERO with respect to the content of North American reliability standards, and to the technical expertise of a regional entity formed on an interconnection-wide basis as to the content of reliability standards applicable within that interconnection.⁵ Section 215(d)(3) provides that *the ERO* shall rebuttably presume that a reliability standard proposal from a regional entity formed on an interconnection-wide basis is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The statute is silent on the deference to be afforded regional entities that

⁵ As discussed in the following section of these Comments, the statute provides that the Commission “shall not defer” with respect to a reliability standard’s effect on competition.

comprise less than an entire interconnection. Moreover, the statute does *not* require the Commission, in its review of a reliability standard, to afford either the ERO or a regional entity formed on an interconnection-wide basis the benefit of any presumption that a proposed reliability standard meets the statutory standards.

The Commission must be careful that its implementation of these provisions promotes strong and clear reliability standards for the North American power grid, and does not lead to balkanization of that grid on reliability matters. The ERO's clear continent-wide reliability standards should be both strong and broad—designed in the first place with awareness of such regional implementation issues as local grid topography and reliance on organized markets. Regional variances in standards can then be targeted to legitimate regional needs, leaving any further regional or local concerns to be addressed through implementation, and thus not end up swallowing Congress' overall intent that there be a single international electric reliability organization promulgating reliability standards. Neither the Commission nor the ERO should “over-read” the rebuttable presumption language (which is only an evidentiary procedure) as *carte blanche* for creating a vastly different system of standards development and regulatory oversight between the western and eastern interconnections. The Commission also should make clear that it will respect the technical expertise of a regional entity organized on less than an interconnection-wide basis⁶ and the fact that some such regions may need to have more stringent reliability rules.

⁶ The existing regional reliability councils, whether or not formed on an interconnection-wide basis, have considerable expertise in the specific characteristics of the portions of the bulk power system in their regions; and with coordinating how operations in their region impact other operators in such region, or impact other regions in the relevant interconnection. For example, the existing

As explained below, however, the Commission appears to have started off on the wrong foot on this topic by over-reading Congress's intent both as to the deference required for the regional entity in part of the country and the deference due to regional entities in other parts of the country.

- a. The Commission Should Correct any Misimpression that a Rebuttable Presumption Applies to the Commission's Review of Interconnection-Wide Regional Entity Reliability Standards.

The NOPR (at P 45) mischaracterizes the statute as attaching a rebuttable presumption to proposals by an interconnection-wide regional entity. Rather, by design the statute provides only that the ERO is to afford such a presumption in its consideration of proposals from such an entity. No such presumption is provided for the Commission's consideration of such proposals. Accordingly, the IRC requests that the Commission make clear that it will not adopt a rebuttable presumption in favor of such proposals in its review proceedings.

- b. The Commission Should Clarify How the Rebuttable Presumption Applies in the ERO's Review of Interconnection-Wide Regional Entity Reliability Standards

The Commission also should make clear that the rebuttable presumption to be afforded by the ERO is an evidentiary presumption, not a requirement to merely accept any proposal. Given the importance of reliability, the ERO cannot be a passive recipient

regional reliability councils in the Eastern Interconnection often comprise tightly interconnected regions—sometimes across national borders—and therefore offer a deep repository of knowledge on the operation, planning, and coordination of those regions. The existing regional reliability councils also provide valuable assistance to RTOs and ISOs as they work with their stakeholders to implement North American-wide reliability standards, by advising and ensuring that implementation measures adopted by individual system operators do not inadvertently impact other operators of the bulk power system.

of proposed reliability standards. Just as the Commission’s staff still investigates the facts and develops evidence in cases where the applicant enjoys a rebuttable presumption on a given issue, the staff of the North American ERO still should have a duty to collect or develop information on the advantages and disadvantages of proposals from an interconnection-wide regional entity. In carrying out this duty, the ERO should comply with basic due process requirements, such as public notice and a reasonable opportunity to be heard.⁷ Following such due diligence, however, if no information rebutting the presumption is presented, then the ERO would accept the standard.

- c. The Commission Should Clarify the “Due Weight” It Will Afford ERO and Interconnection-Wide Regional Entity Reliability Standards; and Acknowledge that It will Afford Appropriate Weight to Standards Proposed by Regional Entities Organized on Less than an Interconnection-Wide Basis.

At the Commission level, the statute provides only that the Commission is to give “due weight” to the technical expertise of the ERO or an interconnection-wide regional entity. The statute does not prescribe what amount of weight is “due.” Congress provided similar direction to the Commission in 1986 amendments to the FPA⁸ to give due weight to the recommendations, expertise, and statutory responsibilities of resource agencies in its consideration of hydroelectric applications; however, it is recognized that the Commission nonetheless may conclude that such recommendations are inconsistent with the FPA and decline to adopt such recommendations, providing only a statement of

⁷ In addition to adopting guidelines to assure such due process, the Commission also should pay close attention to the efficiency, effectiveness, and accountability of the proposed ERO’s reliability standard development and review process.

⁸ Electric Consumers Protection Act of 1986, Pub. L. 99-495, §3(c).

reasons for such action. See FPA section 10(j)(2), 16 U.S.C. § 803(j)(2). In fact, the Commission often declines to adopt such recommendations.⁹

Conversely, the Commission may afford due weight to technical expertise even absent such Congressional guidance, and it particularly has done so in the area of operations and reliability. For example, the Commission “afforded considerable weight to the expertise of the pipeline” when evaluating the operational mechanisms proposed for providing restructured services under Order No. 636.¹⁰ More broadly, the Commission has discretion to determine the probative weight of expert testimony in the record of its proceedings,¹¹ and will give it “such weight as the trier of fact thinks it deserves.”¹²

Therefore, the final rule should make clear the limits on the “due weight” it will afford proposals by the ERO or interconnection-wide reliability entities. Equally important, the Commission should disavow any suggestion in the NOPR (e.g., at P 46) that it will afford no (or lesser) weight to the expertise of regional entities that comprise less than an interconnection. The regional entities under development that comprise one or more of the existing regional reliability councils will draw on the invaluable

⁹ See, e.g., Black River Ltd. P’ship, 97 FERC ¶ 62,194, at 64,298 (2001); Cameron Gas & Elec. Co., 96 FERC ¶ 62,182, at 64,356-57 (2001); Consumers Energy Co., 95 FERC ¶ 62,246, at 64,369-70 (2001).

¹⁰ E. Shore Natural Gas Co., 81 FERC ¶ 61,013, at 61,084 (1997); Texas E. Transmission Corp., 63 FERC ¶ 61,100, at 61,472 (1993).

¹¹ Williston Basin Interstate Pipeline Co., 68 FERC ¶ 61,357, at 62,432 (1994), citing Mkt St. Ry. Co. v. Railroad Comm’n of Cal., 324 U.S. 548. 560 (1945).

¹² Kansas Gas & Elec. Co., 7 FERC ¶ 63,051, at 65,253 (1979), citing Duke Labs., Inc. v. United States, 222 F. Supp 400 (D. Conn. 1963), aff’d 337 F.2d 280 (2d Cir. 1964).

experience and resources of those councils on reliability matters.¹³ The Commission should acknowledge that it will afford the views and proposals of such entities the weight they are due, taking into account their collective experience, as well as the value added by their stakeholder procedures and governance.

If the Commission does not provide strong guidance on this issue, there is a great risk that the process could lead to divergent standards in the western interconnection (which is served by the Western Electricity Coordinating Council (“WECC”)) and eastern interconnection (which has been served for many decades by multiple regional reliability councils). The Commission should make clear its expectation that the ERO will not become a mere pass-through for reliability standards proposed in the west, and devote its time and attention solely to standards proposed for the east.¹⁴

The Commission can best avoid this undesirable outcome by emphasizing in the final rule that the ERO should promulgate strong and clear North American reliability standards that are broad enough to protect reliability in both the east and the west, and in areas with or without organized markets. By ensuring that the ERO standards appropriately focus on the “what” and not the “how” associated with implementation, the Commission can greatly reduce the impetus behind regional variations in reliability standards. In the main, all regions would adhere to common North American reliability standards, accommodating their differing regional practices and concerns (particularly

¹³ As explained above (in footnote 6), the existing regional reliability councils have considerable expertise concerning the bulk power system in their regions, to which appropriate deference is due.

¹⁴ The Commission may appropriately consider a more deferential approach to the Texas Regional Entity. However, the Commission should do this in recognition that the entity is subject to the complete oversight at both the wholesale and retail level by the Texas Public Utilities Commission, rather than solely on the basis that the entity is organized on an interconnection-wide basis.

with respect to operation of markets) through their implementation of practices designed to satisfy such standards.

To the extent, however, that the ERO standards fail to address a unique situation requiring more stringent rules, regional entities would be allowed to implement such rules as supplements to the national standards, not as deviations from them. These additional region-specific requirements would only take effect after they were filed by the ERO and approved by the Commission. As with proposed standards from the West, the ERO would not merely act as a pass-through of regional rules. With these checks and balances, regional standards should become the exception, rather than the norm; the ERO will promulgate appropriate and meaningful standards for broad international application, and not simply “least common denominator” standards.

2. Definition, and Examples, of “Competition” for Purposes of the Statutory Requirement that the Commission “Shall Not Defer” to the ERO or a Regional Entity “With Respect to the Effect of a Standard on Competition.” NOPR at P 48.

Broadly speaking, a reliability standard can adversely affect competition if it creates an undue preference for one market participant (or one class of market participants) at the expense of another or drives an outcome that eliminates the ability of the market to respond with market-oriented solutions that meet reliability needs. As noted below, the standards development process should consider whether the standard is in fact market neutral and capable of being implemented both in market and non-market areas with non-discriminatory results.

Reliability requirements necessarily define the field within which market players compete, but must not unreasonably tilt that field in favor of some players. Some differences are unavoidable; for example, a generation operating parameter will not affect

a transmission owner the same way it affects a generation owner. But if market participants are affected differently in ways that are not needed to preserve reliability, or if alternatives are identified that mitigate market participant impacts without adversely affecting reliability, then the proposed standard has an “effect . . . on competition.” Whenever such unwarranted differential impacts are alleged, the statute requires that the Commission “shall not defer” to the ERO (or regional entity) and instead must evaluate such impacts de novo.

Moreover, at a minimum, impact on competition includes any impact on an RTO’s market rules. Any effect on market rules, even short of an outright conflict, is by definition an impact on competition which the Commission should review de novo.

Therefore, the Commission should make clear that it shall not defer to the ERO or a regional entity on any question of whether a proposed standard creates an undue preference for one market participant (or one class of market participants) at the expense of another. Similarly, the Commission should confirm that it shall not defer on any question of the impact of a standard on tariffed market rules or the significance of that impact to the effective functioning of the wholesale market.

3. How Should the Statutory Standard of “Just, Reasonable, Not Unduly Discriminatory or Preferential, and in the Public Interest” Be Applied in the Context of Reviewing Proposed Reliability Standards? NOPR at P 55.

The IRC proposes that the Commission recognize the following as considerations that will guide its evaluation of whether proposed standards are just, reasonable, not unduly discriminatory or preferential, and in the public interest:

- *Will compliance with the standard sufficiently enhance or protect reliability so as to make adoption of the standard appropriate?*

- *Is the particular standard the best way to define and measure the intended reliability objective? Will adoption of the standard lead to any unintended consequences and, if so, have those consequences and their impact been appropriately evaluated in the standard development process?*
- *Is the standard clear and unambiguous such that a balancing authority or other entity, applying reasonable judgment and in keeping with good utility practice, can understand and implement the standard in a manner that will accomplish its intended result?*
- *Is the standard sufficiently clear and unambiguous such that an entity subject to the standard can reasonably understand the standard and conform its conduct to the standard?*
- *Have conflicts between the standard and approved tariffs been appropriately resolved?*
- *Is the standard designed to be neutral in its impacts on similarly situated entities and to not unduly favor or disfavor areas with organized markets or areas without such markets?*
- *Will entities to which the standard is applicable be able to implement the standard in a relatively uniform manner and without violating their tariffs on file with the Commission or their obligations under state law?*
- *Is the standard capable of being implemented and enforced in other affected countries as well as the United States?*

4. What are the Implications of One Jurisdiction’s Remand of a Multi-jurisdiction Reliability Standard? NOPR at P 57.

On August 9, 2005, the U. S. Department of Energy and the Federal-Provincial-Territorial (“FPT”) Working Group in Canada jointly submitted to the Commission “Principles for an Electric Reliability Organization that Can Function on an International Basis” (“Bilateral Principles”). In soliciting comments on its proposed regulations concerning the review of reliability standards, the Commission notes that the Bilateral Principles include a provision that if a standard is remanded by a regulatory authority, the ERO should notify all relevant regulatory authorities, and should work to ensure that the

concerns of all such authorities are addressed prior to resubmission of the standard. NOPR at P 57. The Commission asks whether this principle should be incorporated into the final rule. Id. The Commission also asks parties to comment on the implications of the remand by a Canadian authority of a reliability standard approved by this Commission. Id.

The IRC supports the Commission's incorporation in the final rule of this aspect of the Bilateral Principles. Effective communication and coordination will be key to ensuring a standard development process that is, in the first instance, acceptable to both nations. As to the Commission's second question, if the scenario posited by the Commission were to arise, it would represent a troubling failure of the process. As recommended in the previous section, the Commission should consider, when first evaluating a standard, if the parties have satisfactorily resolved whether the standard can be appropriately implemented in all other affected jurisdictions. Moreover, preventing such conflicts should be an integral, high-priority element of the procedures and stakeholder processes of the ERO and any cross-border regional entities.

In the unfortunate event that such a conflict nevertheless were to arise, the parties in the non-remanding jurisdiction would not be relieved of the obligation to comply with the affected standard, but parties in the remanding jurisdiction would be so relieved. Cross-border regional entities would take this into account in considering any enforcement actions.

C. Section 38.5 -- Enforcement of Reliability Standards.

1. Can an ISO or RTO serve as a regional entity, and if so, pursuant to what measures to ensure the independence of the enforcement unit? NOPR at P 71(9).

Although certain of the IRC members have indicated their intent at this time not to serve as regional entities assessing penalties for violations of standards, others (including some that currently perform those functions in their regions and some that may wish to do so in the future) wish to present their case to the Commission for serving as a regional entity. Rather than generically proscribing ISO/RTOs from serving in this role in the final rule, each such entity should be permitted to present its arguments and plans to address any necessary separation requirements, in the Commission proceedings on the delegation agreement (or upon a complaint for failure of the ERO to enter into such an agreement).

Importantly, although the policy issues will inevitably be debated in this docket, it is worth noting that the *statutory* criteria for regional entities do not bar RTOs or ISOs from serving in this role.¹⁵ Consequently, the Commission’s citation to an external document—the “Bilateral Principles”—as the sole basis for a complete bar on RTOs or ISOs serving as regional entities does not satisfy basic standards of reasoned decision-making.¹⁶

¹⁵ Subject to the proponent of this function within a larger RTO/ISO organization including “rules that assure its independence of the . . . operators of the bulk power system.” FPA § 215(c)(2).

¹⁶ See, e.g., Elec. Consumers Res. Council v. FERC, 747 F.2d 1511, 1513 (D.C. Cir. 1984); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

2. Should the Final Rule Allow the Imposition of Penalties on Individual Board Members of the ERO and Regional Entities? NOPR at P 77.

The Commission should not adopt this approach. The ERO and regional entities must have the opportunity to attract the best talent to serve as board members. Imposing personal liability for penalties on board members will only work to discourage candidates for board membership, or require exorbitant expenses for insurance to cover the potentially quite large civil penalties such board members could face.¹⁷ Moreover, imposing such penalties is not necessary to achieve the Commission's objective of assuring compliance with reliability standards and Commission orders. The Commission maintains the powerful tool of potentially decertifying an entity that has failed to carry out its responsibilities, and has complete control over the regional entities' and ERO's by-laws, budget and enforcement programs. All of these tools are far more effective levers that will not discourage service on the ERO or regional entity boards, or unduly drive up the costs of director's insurance.

3. Should the monetary penalties collected by the ERO or a regional entity be used to defray the cost of their enforcement programs, or should those funds be allocated to some other use? NOPR at P 71(7).

The Commission raises a valid concern that allowing the ERO or a regional entity to fund its enforcement program with penalty money would "create an appearance of impropriety." NOPR at P 71(7). To eliminate the appearance of any improper incentive

¹⁷ The amended FPA allows the Commission to impose civil penalties of up to one million dollars per day for violations of Commission rules or orders, which the Commission interprets to include reliability standards. See FPA § 316A, 16 USC § 825o-1

to penalize, penalty money should not accrue to any of the ERO's or regional entities' standards-setting or enforcement functions.

D. Section 38.7 – Delegations to a Regional Entity

1. Status of Regional Entity Reliability Proposals. NOPR at P 80.

FPA section 215(e)(4) requires the Commission to issue regulations authorizing the ERO to enter into agreements “delegating authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards.” In the NOPR, the Commission proposes to implement this requirement through new section 38.7 of its regulations. As the Commission interprets the statute, the only delegated authority the regional entity would possess would be the power to enforce Commission-approved reliability standards in its region, since any reliability standards developed by the regional entity must be proposed to the ERO for its consideration before submission to the Commission. NOPR at P 80. The Commission also states that standards proposed by a regional entity would not be reliability standards, but instead would be “ERO variances,” adding that “any such regional variances would supplement ERO Reliability Standards, not substitute for them.” Id. The Commission seeks comments on these interpretations.

As noted above, the guiding principle for the ERO's North American reliability standards should be clear standards that are broad enough to be capable of implementation, without discriminatory impact, in all interconnections and in areas with or without organized markets. The NOPR's discussion of whether proposals by a regional entity are or are not “reliability standards” is not productive, and is contrary to the repeated references in the statute to “regional entities” in connection with the

proposal or development of “reliability standards.”¹⁸ Rather than debating generically whether regional entity proposals are standards or variations, the Commission should apply the same principles to evaluating regional entity proposals as it applies to ERO proposals, i.e., the focus should be on “what” the standard requires, and not “how” the standard should be implemented by system operators and planners. Moreover, the ERO should undertake a threshold review of whether the standard can in fact be implemented across North America or, by contrast, whether it will drive a plethora of regional variances. Such a threshold review will go further to drive the North American standards that Congress intended than a detailed delineation by the Commission which inadvertently invites a host of regional variances and regional standards.

2. Should There Be a 180-Day Waiting Period for Recourse to the Commission If Delegation Agreement Negotiations Reach an Impasse? NOPR at P 83.

The Commission does not explain or justify the proposed requirement that prospective regional entities must wait until 180 days after proposing a delegation agreement to the ERO before seeking Commission action. The parties could reach an impasse well before 180 days have elapsed. In that event, the prospective regional entity should not be barred from access to the Commission until the end of the waiting period. If such an entity can make a convincing showing under the proposed regulatory standard, i.e., that “continued negotiations with the ERO would not likely result in a delegation agreement within a reasonable amount of time,” then it should be permitted to make its

¹⁸ See FPA §§ 215(d)(2), (d)(3), (e)(4), and (e)(4)(1)(B) (incorporating for regional entities the certification requirements of section (c)(1) relating to the “ability to develop . . . reliability standards”).

case to the Commission without further delay.¹⁹ Accordingly, the IRC requests that the Commission delete from proposed section 38.7(e) the words “within 180 days.”

3. Should the Commission prescribe a “size, scope, or configuration requirement” for regional entities? NOPR at P 84(1).

While size, scope or configuration will be relevant considerations for the Commission in determining whether a proposed delegation “promotes effective and efficient administration of bulk-power system reliability,” FPA section 215(e)(4)(C), the Commission should not attempt to codify generic requirements in its regulations on this topic. Such issues will be intensely fact-specific, and will vary from region to region. Moreover, the Commission has not developed a record in this rulemaking that would provide adequate notice or justification for any generic prescriptions on size, scope or configuration. Whether a proposed regional entity conforms precisely to one or more existing regional reliability councils, RTOs, ISOs, balancing authorities, control areas, states, or provinces should be left in the first instance to the proponents of a regional entity, as developed through their stakeholder processes. The Commission has ample authority under the statutory standard for delegations to address any particular size or configuration issues raised on a case-by-case basis.

4. Should the ERO require regional entities to adhere to uniform processes in such matters as governance, collection of dues and fees, or compliance monitoring? NOPR at P 84(5).

While the Commission (and the ERO) generally should permit delegation agreements to develop based on the needs of particular regions, additional guidance is

¹⁹ The proposed 180-day delay also is inconsistent with the urgency Congress attached to implementation of electric reliability rules (see FPA section 215(b)(2)), and with the urgency reflected in the Commission’s proposal to consider both ERO certification and proposed reliability standards in a single proceeding. NOPR at P 104.

warranted on crucial questions of regional entity governance. In particular, the Commission should clarify that that each vital stakeholder group, such as RTOs and ISOs, should be represented on “balanced stakeholder boards”²⁰ and should have a separate voting sector for “an independent board.”²¹ Given the very limited number of RTOs or ISOs in any region, including them in any large group of entities (such as transmission owners) whose interests are not aligned with theirs means that they will be easily outvoted in any one-person, one-vote structure. This could lead to ISOs/RTOs not being adequately represented on reliability matters, despite their very significant reliability role.

By Commission design, the ISO/RTO role in implementing reliability standards exceeds that of any other single stakeholder. Within its region, an RTO must have “exclusive authority for maintaining the short-term reliability of the grid,”²² is responsible for planning transmission system upgrades,²³ and is responsible for interregional coordination with other regions.²⁴ Moreover, many ISOs and RTOs are charged with the dual responsibility of maintaining a reliable electric system and operating competitive markets under fair rules. As Congress recognized,²⁵ there inevitably will be interactions between reliability rules and market rules, and changes to

²⁰ See FPA § 215(e)(4)(A)(ii).

²¹ Id.

²² 18 C.F.R. § 35.34(j)(4).

²³ 18 C.F.R. § 35.34(k)(7).

²⁴ 18 C.F.R. § 35.34(k)(8).

²⁵ Congress directed the Commission to assess the effects of reliability standards on competition, and established special rules to resolve conflicts between reliability standards and ISO/RTO tariffs. FPA §§ 215(d)(2), (6).

one could affect the other. Because reliability rules must “work” in a market paradigm, RTOs and ISOs must have a significant voice in the development and ratification of reliability standards.

Accordingly, regional entity governance should allow a significant role for ISOs/RTOs. Moreover, to assure that authority rests with the properly constituted board (whether of the “independent” or “balanced stakeholder” type), the staff of the ERO and the regional entity should report to their respective boards, and not to stakeholder committees. The board of the ERO or the regional entity should review and approve any new or revised standard.

5. What role, if any, should the ERO play in the approval or appeal of an enforcement action undertaken by a regional entity? NOPR at P 84(6).

The IRC supports direct appeal to the Commission of regional entity enforcement actions. The statute permits delegation of enforcement authority to regional entities,²⁶ and includes a mechanism for Commission review of all enforcement actions.²⁷ The statute therefore allows direct appeal, and that is the most efficient course. The regional entity will have the full record on any enforcement action it undertakes, full knowledge of the particulars, and presumably sufficient expertise to address the matter (in order to obtain delegated enforcement authority in the first place). Under those circumstances, it is not clear that ERO review would add sufficient value to the process, or materially aid development of the record, to warrant the added time and expense of an additional layer of review. Therefore, to promote timely final resolution of enforcement matters, the

²⁶ FPA section 215(e)(4).

²⁷ FPA section 215(e)(2).

affected parties should have direct recourse to the Commission after the regional entity has completed its process.

This is not to say that there is no role for the ERO, however. The Commission's rules should state that the ERO may participate both in the regional entity enforcement actions, and in the Commission's review proceeding, as of right.

6. Should a Higher Standard Apply to Regional Entities that Are Not Organized on an Interconnection-wide Basis? NOPR at P 84(9).

Citing the statute's rebuttable presumption for regional entities formed on an interconnection-wide basis, the Commission asks whether "a higher standard [should] apply to Regional Entities that are not organized on an Interconnection-wide basis." NOPR at P 84 (9).

The IRC disagrees with the Commission's suggestion that the rebuttable presumption that regional entities formed on an interconnection-wide basis meet one element of the statutory approval standard requires a higher substantive standard for regional entities not formed on such a basis. The statute sets multiple detailed criteria for approval of *all* regional entities, regardless of whether they are organized on an interconnection-wide basis. See FPA §§ 215(e)(4) and 215(c)(1),(2). The only difference for interconnection-wide regional entities is that the statute establishes a rebuttable presumption that they meet one of these criteria. Moreover, the rebuttable presumption is only an evidentiary presumption; as discussed below, it relates only to the evidentiary procedures used to determine whether the particular substantive criterion is satisfied.

Rather than creating new substantive hurdles to regional entity approval that are not in the statute, the Commission should focus on the procedures it will use to

implement the rebuttable presumption. Consistent with its standard approach to similar presumptions, the Commission should clarify that the presumption shifts to opponents of an interconnection-wide proposal the burden of coming forward with evidence raising a serious doubt that the proposal does not promote the effective and efficient administration of bulk-power system reliability. If that burden of coming forward is met, then the burden should shift to the proponents of the proposal to show, by a preponderance of the evidence, that the proposal satisfies this criterion.²⁸

E. Section 38.9 – Examples of Areas in Which Conflicts between Reliability Standards and ISO/RTO Tariffs May Arise. NOPR at P 91.

The Commission has, through its proposed rules, developed appropriate provisions to implement section 215(d)(6) of the legislation. Through that provision, Congress foresaw the potential for conflicts between approved ISO/RTO tariffs, including the ISO/RTO existing market rules embodied in those tariffs and either the application or the interpretation and enforcement of a reliability standard. The provision provides a prompt opportunity for Commission review and provides that the ISO/RTO tariff remains in effect pending resolution of the conflict.

Issues have arisen in the past concerning interactions between market rules and reliability standards, and therefore similar issues may occur in the future if they are not

²⁸ See, e.g., Union Elec. Co., Opinion No. 279, 40 FERC ¶ 61,046, at 61,126 (1987) (although Commission policy establishes a presumption that utility investments are prudent, “[g]iven the questions raised by the evidence presented, [the Commission] finds that Union has not sustained its burden of proving that these costs were prudently incurred”); Minn. Power & Light Co., Opinion No. 86, 11 FERC ¶ 61,312, at 61,644-45 (1980) (where “participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent”).

anticipated and addressed in the standards-setting process. As noted previously, if standards are designed to be successfully implemented in any region, whether or not it is served by an ISO/RTO, and whether or not it has an organized market, the opportunity for problems will be reduced. Problems will arise, however, if the standards cross the line from defining the level of reliability (the “what”) to instead dictating implementation (the “how”), which is the area most likely already addressed in the tariffs and operating manuals of each ISO/RTO.

Moreover, conflicts can arise not just in the language of the standard itself but in the interpretation and enforcement of reliability standards. It is likely that the conflict resolution mechanism set forth in Section 215(d)(6) may be invoked more in resolving conflicts with interpretation and enforcement, since conflicts with the standard itself should be identified, to the extent known, in the standards development and Commission approval process. However, the interpretation and enforcement process, if not carefully handled, is an area where such conflicts may inevitably need to be brought to the Commission for resolution.

By way of example, conflicts have arisen in the past between market rules and reliability standards in areas such as transmission line loading relief (“TLR”), NERC tagging rules, and voltage support. Although the NERC TLR standard was recently amended to allow for redispatch under a congestion management system, TLRs for years were recognized as the chief tool to meet compliance with NERC standards. Moreover, the TLR standard itself is highly proscriptive and forces ISOs/RTOs to curtail more transactions than their operating procedures and market information would reveal is the most economically efficient to solve the particular overload. By the same token, NERC

tagging rules, although presently workable, are an area where future conflicts may arise. Such rules are based on a physical world of individual generators matched to individual transactions, which does not correspond well to an ISO/RTO with organized markets, where virtually all transmission service is considered network service and not tied to particular generators.

Reliability-based ancillary services, such as voltage support, also are an area of potential conflict. An ISO/RTO's market-based system allows suppliers to bid to provide needed reliability-based services such as black start, spinning reserve and reactive power for voltage support. The market encourages an entity to provide these services at a competitive rate, since a supra-competitive bid will not be accepted in the marketplace. Moreover, in a market-based system, an entity that fails to self-supply these services can, absent shortage, obtain them from the market at the established clearing price. These mechanisms are market-based "enforcement" mechanisms that work to ensure an adequate level of these necessary ancillary services without requiring individual generators or load serving entities to supply these resources individually or face monetary penalties for failing to do so. Accordingly, reliability standards and enforcement actions should complement the market-based identification of the most efficient resource, rather than provoke inefficient responses by market participants solely to avoid penalties. The Commission should be cognizant of these areas which, more than likely, will be presented in the context of enforcement proceedings when an entity being penalized invokes an ISO/RTO tariff as a defense to its actions.

Moreover, assuring that ISOs/RTOs have a strong level of representation at both the ERO and the regional entity, as proposed in section II.D.4 of these Comments, will

allow them to better assist in separating legitimate tariff-based defenses of market participants from defenses which inappropriately invoke the tariff. The ISO/RTO Council stands ready to serve as a resource to both the ERO and the Commission as they address such issues in the development, interpretation and enforcement of reliability standards.

CONCLUSION

The IRC asks that the Commission reflect these comments in adopting the final rule in these proceedings.

Respectfully submitted,

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October 7, 2005