UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Reliability Standard Compliance and Enforcement in Regions with Independent System Operators and Regional Transmission Organizations	Docket No. AD07-12-000

COMMENTS OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC., THE MIDWEST INDEPENDENT TRANSMISSION SYSTEM OPERATOR, INC. AND THE ELECTRIC RELIABILITY COUNCIL OF TEXAS

The New York Independent System Operator, Inc. (NYISO), the Midwest Independent Transmission System Operator, Inc.(Midwest ISO), and the Electric Reliability Council of Texas, Inc. (ERCOT), respectfully submit these comments in response to the comments filed by the North American Electric Reliability Corporation (NERC) on November 6, 2007. The NYISO, Midwest ISO and ERCOT previously participated in the joint comments filed by the ISO/RTO Council on October 2, 2007.

I. COMMENTS

As confirmed by the Commission in Order No. 672 and as discussed in the ISO/RTO Council comments filed on October 2, 2007, reliability compliance will not be enhanced if registered entities are penalized for violations they did not cause.[1] Yet, in NERC's latest comments filed on November 6, 2007, NERC confirms that its policies will indeed have the effect of penalizing entities for violations they did not cause.

[1] Order 672 at P 636 (stating that FERC "generally agrees that entities should not be punished for violations that are not within their control").

After arguing that RTOs and ISOs should not have authority to assess responsibility to third parties for violating reliability standards independent of the NERC/Regional Entity enforcement process, NERC then states that:

> [it] would not be concerned about a Direct Assignment proposal if the direct assignment to a particular entity of the costs of a monetary penalty imposed on an RTO or ISO were based on a determination made in the Regional Entity or ERO compliance enforcement process or hearing that the entity assigned responsibility for the costs was responsible (in whole or in part) for the violation of the reliability standard or the actions that resulted in the violation. In this way the determination of responsibility for violation of the reliability standard would be made by the entities assigned this function by Congress and the Commission, not through a redundant process by an entity (the RTO or ISO) that was not given this statutory function.[2]

NERC also states that its compliance monitoring and enforcement processes will result in identification of all of the entities whose actions caused or contributed to a reliability standard and that "it is unwarranted . . . to suggest or presume that the Regional Entities and NERC will not identify the root cause of a violation."[3] Nevertheless, NERC also states that:

> While NERC's representative at the technical conference did correctly note that NERC will not be able to determine the proportion of parties' culpability for violating standards to the percentage point and that RTOs as registered entities would be liable for penalties that apply to the functions for which they are registered, the NERC representative also clearly explained that the ERO would examine the "root cause" of a violation...[4]

The NYISO, Midwest ISO and ERCOT respectfully wish to raise two concerns related to the NERC Comments. In addition, the NYISO, Midwest ISO and ERCOT request that the Commission consider issuing a Notice of Inquiry on this issue to ensure that any necessary changes required in NERC's procedures are addressed.

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[2] NERC Comments at 5.

[3] *Id.* at 9.

[4] *Id.* (emphasis added).

A. Root-Cause Findings and Penalties Must Be Linked.

Taken together, the above-quoted statements indicate that NERC agrees that it should and will determine the root cause of a violation, but NERC also appears to maintain that registered entities will be penalized for a standards violation for functions for which they are registered regardless of what NERC identifies as the "root cause." This is enforcement for enforcement's sake, and it is not in the public interest because it neither enhances reliability nor deters future violations. If penalties are assessed against a non-profit ISO/RTO, the ISO/RTO will most likely have to seek authority to pass through the cost to its market participants, who are also not at fault in the violation. Penalizing entities that have no control over violations serves no legitimate purpose. If NERC does not want an ISO or RTO to apportion responsibility for a violation outside the NERC enforcement process, then NERC must determine which entity is at fault and ensure that only that entity is subject to penalties.

NERC does not specifically indicate why it would be unable to penalize directly the entity that is the root cause of a violation. There appear, however, to be two situations where that may be the case: (1) because the entity at fault is unregistered; or (2) because the entity at fault is not a responsible entity for the function under which a violation is labeled. In the first instance, an ISO/RTO should not bear a penalty because of NERC's proclaimed inability to penalize directly an unregistered entity for past actions.[5] NERC is responsible for obtaining

[5] NERC states that if an unregistered entity violates a standard or requirement of a standard, "the Regional Entity will register the entity and require a mitigation plan and the newly registered entity will be subject to any enforcement resulting from any subsequent violations." NERC Comments at 9 (emphasis added). *But see* Energy Policy Act of 2005, § 1211 (creating Federal Power Act § 215(b) and specifically granting the Commission and the ERO jurisdiction over "all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 201(f), for purposes of . . . enforcing compliance with this section.")

the registration of all entities that are users of the Bulk Power System and, one could argue, NERC would be accountable in the first instance for failing to register an entity that should have been registered. At the very least, FERC should require that NERC establish a policy against assessing penalties against registered entities for violations in which the root cause is found to be the actions of an unregistered entity. FERC should also ensure that such a policy does not cause NERC to tend toward the institutional bias of finding root causes only with registered entities, if the facts do not support such a finding.

In the second instance, NERC's position seems to be that an entity cannot be penalized as the "root cause" violator of a standard that is assigned to a function other than the function(s) under which the entity is registered. If so, there is something amiss with the way in which responsible entities are determined. NERC should ensure that all entities are held accountable, either as responsible entities or otherwise, for their acts or omissions that may be the root cause of a standards violation for themselves or any other entity.

To use the example discussed in NERC's comments,[6] if a generator is responsible for providing information to a balancing authority and the generator's failure to do so will subject the balancing authority to a standards violation, then the generator's provision of information should either be part of the standard requirements with which the generator must comply or the requirement should be part of the balancing authority standard for which the generator should be considered a responsible entity.

Finally, NERC states that the Joint Registration Organization (JRO) option is available to ISOs and RTOs to help alleviate its concerns regarding the potential for penalty

[6] NERC Comments at 6 (referring to the discussion at the Technical Conference, TR at 109-110.

assessments caused by acts of others. However, the JRO procedures, as currently formulated, are voluntary in nature and may not solve all issues in the ISO/RTO context. There are strong disincentives for an entity, such as a generator, in NERC's example, to sign on to a JRO agreement and thereby expose itself to direct liability. Likewise, it may not be feasible for an ISO or RTO to obtain agreements or tariff provisions that would require entities to pay penalties that are levied on the ISO or RTO without the consent of its market participants.[7] Again, there are no incentives for market participants to voluntarily agree to such requirements (either through signing an agreement or by consenting to required tariff filings). Moreover, even if such agreements or tariff provisions were in place, the end result would be that an ISO or RTO would *de facto* become the enforcer of the reliability standards requirements by having to pursue actions for breach of contract or tariff violations against the entities at fault -- a situation that NERC has strenuously opposed, as discussed above.

B. Joint and Several Liability Will Only Foster Secondary Litigation.

As noted above, NERC has affirmed that it will not "determine the proportion of parties' culpability for violating standards to the percentage point."[8] The NYISO, MISO, and ERCOT understand this to mean that, where two or more entities are found liable for violating a single standard, NERC will announce a joint penalty with no direction as to how it should be divided. But if more than one entity is responsible for a violation, FERC should direct NERC to adopt criteria and procedures for apportioning responsibility among those entities. NERC should not be permitted to simply assess a violation on a registered entity, refuse to

[7] For example, the NYISO does not have authority to make tariff revisions under Section 205 without the consent of market participants following a stakeholder governance process.

[8] NERC Comment at 9.

apportion responsibility if other entities share responsibility, whether registered or not, and further prohibit the registered entity from itself apportioning responsibility. NERC must apportion responsibility for violation and penalties among contributing entities in the first instance.

Moreover, if NERC's approach is to not apportion liability (and resulting penalties), this approach will encourage precisely the sort of secondary litigation that the Commission sought to avoid when it opened this Administrative Docket.[9] Further, it is difficult to comprehend why NERC could issue dollar-precise penalties to Party A for violating Standard X and Party B for violating Standard Y, but could not determine party-specific dollar amounts should both of them violate Standard Z. As the Commission knows, the electric industry is, by design and operation, a collaborative industry, and this issue will be squarely presented in many, if not most, investigations.

II. CONCLUSION

FERC should determine that NERC's rules must make compliance with mandatory electric reliability standards the responsibility of all entities that may cause a violation, and direct NERC to adopt rules and procedures that will hold all such entities directly responsible for their actions, including specific proportionate liability as appropriate, and not simply assess penalties against a registered entity for actions of third parties that the registered entity cannot control. In addition, the NYISO, Midwest ISO and ERCOT request that the

[9] 119 FERC ¶ 61,222, *Order Rejecting Tariff Changes without Prejudice and Establishing Technical Conference* (May 31, 2007) at ¶¶ 24, 26 (raising concerns about "duplicative" and "redundant" investigations and litigation).

Commission consider issuing a Notice of Inquiry on this issue to ensure that any necessary changes required in NERC's procedures are addressed.

Respectfully submitted,

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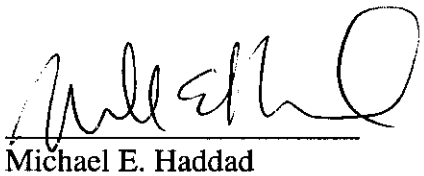
Dated: January 7, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 7th day of January 2008.



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