

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

Direct Energy Services, LLC)	Docket No. RC07-4-000
Sempra Energy Solutions LLC)	Docket No. RC07-6-000
Strategic Energy, L.L.C.)	Docket No. RC07-7-000

**MOTION TO INTERVENE AND COMMENTS OF
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)**

Pursuant to Rule 213 of the Rules of Practice of the Federal Energy Regulatory Commission (FERC), the Electricity Consumers Resource Council (ELCON) requests leave to file this motion for intervention out of time in response to a Request for Clarification submitted by the North American Electric Reliability Corporation (NERC) on January 22, 2008, in the above-captioned dockets. NERC abides by the decision that the Federal Energy Regulatory Commission reached on December 20, 2007, 121 FERC ¶ 61,274 (2007) (the December 20 Decision) to the extent that FERC reversed registration of three retail power markets (RPMs) since the RPMs are not “directly connected to the Bulk-Power System as specified in the NERC Registry Criteria applicable to load-serving entities. However, NERC seeks what it terms as a “clarification” on two issues:

- (1) The Commission did not intend to rule that where an entity meets the applicable criteria to be registered by NERC or a Regional Entity as a type of functional entity in the NERC Compliance Registry, registration is not precluded by the fact that the same or a similar entity has not been registered as that type of functional entity in a different Region (¶¶ 35 and 41-43); and
- (2) The Commission did not intend to rule that where a Reliability Standard Requirement imposes reliability obligations on more than one type of functional entity, only one of the functional entity types need be registered and the other functional entity types do not need to be registered nor comply with the Requirement; nor that to register an entity for a reliability function, NERC needs to comprehensively identify all the Reliability Standards which will apply to that (type of) entity (¶¶ 35 and 46-47).

ELCON strongly opposes NERC's request. Rather than a "clarification," NERC in reality seeks a new finding from the Commission, not germane to the case at hand, that would have broad future applicability and effect—a request that the NERC regions be excused: (1) from obligations of consistency, thereby subjecting market participants to a patchwork quilt of different registration requirements; and (2) from specifying the specific reliability standards with which the entity must comply. To the extent that NERC has sought certification from FERC to exercise quasi-regulatory functions over reliability, it must adhere to well-recognized standards of due process and reasoned decision-making. NERC's request provides insufficient justification and in effect asks for the Commission to give it *carte blanche* in its registration decisions—a dangerous precedent.

ELCON's Motion To Intervene Out of Time Should Be Granted

While many requests for clarification raise issues within the four corners of a Commission's decision that directly relate to the initial application, NERC's request raises new policy issues that extend far beyond the question of whether the RPMs at issue in these dockets should be required to register although they lack physical assets that directly connect them to the grid. NERC raises two entirely different questions: (i) whether the NERC registry should be implemented differently from one region to another; (ii) whether NERC should be excused from registering entities when it cannot identify specific standards with which the entity must comply. ELCON did not intervene in response to the appeals that the RPMs filed on September 11, 2007, because its members were not directly affected by the issue of registration of these three RPMs. However, NERC's ill-considered Request for Clarification broadens the field of potentially aggrieved parties way beyond the three RPMs. Many ELCON members are customer generators and thus have a direct interest in the criteria and outcome of the registration process as applied by the regional reliability entities. ELCON members are thus entitled to intervene on the

questions posed by NERC's request to the extent that they relate to the need for consistency across the regions and the necessity for NERC to specify reliability standards applicable to entities that regional reliability entities seek to register.

The fact that ELCON is not already an intervenor should not preclude ELCON's intervention at this stage of the proceedings when NERC has raised issues that extend beyond the question of registration of the three RPMs. ELCON's intervention does not address the issue joined in the RPMs' September 11 appeal but rather the new issues raised by NERC's Request for Clarification.

Substantive Comments

ELCON supports the goal of maintaining an electric reliability system. ELCON specifically supports registration of those entities whose operations have a material impact on the electric power grid. However, NERC's Request for Clarification would set a dangerous precedent by allowing inconsistent determinations between the regions and by subjecting entities proposed to be registered to uncertainty with respect to the standards that would apply to them. This proceeding also indicates certain infirmities in NERC's registration regime that require increased oversight by FERC.

1. FERC Should Reject NERC's Request That It Need Not Act Consistently In Registration Decisions

In its December 20 Decision, the Commission correctly observed that NERC must act consistently in its registration determinations or alternatively justify differential treatment:

41. The appellants and several commenters represent that other Regional Entities considered whether to register retail marketers as LSEs and declined to do so. Neither NERC nor ReliabilityFirst refute these representations. Nor do they articulate any rationale why it is appropriate to treat retail marketers in ReliabilityFirst differently than retail marketers in other regions.

42. ReliabilityFirst suggests that NERC will "ensure that retail power marketers that function as LSEs will be registered as LSEs where appropriate...." NERC,

however, is silent on the matter. ReliabilityFirst's representation does not provide the Commission with adequate assurance that NERC is developing a plan for consistently addressing the treatment of retail marketers across the regions. Moreover, according to commenters, Regional Entities other than ReliabilityFirst have either declined to register retail marketers as LSEs or, in the case of NPCC, reversed an earlier registry decision on the matter, as recently as October 2007.

43. The Commission believes that the registration process should provide consistency across the regions, unless a persuasive reason is articulated for such differences. This does not appear to be the case with regard to the registration of retail marketers as LSEs.

While NERC acknowledges that it has made a "commitment" to "assure uniformity and consistency in the application of its Registry criteria" (Request for Clarification at 5), NERC in effect now asks to be excused from that commitment because it does not "have a comprehensive view of registrations *that are not made* at the individual Regional Entities (*Id.* at 4) and because "registration is still a relatively new process" (*Id.* at 5). Neither of these excuses passes muster. While NERC's knowledge of no registration decisions may be imperfect, where the applicants document inconsistency in registration, NERC must justify inconsistency in determinations based on region-specific characteristics. NERC's Rules of Practice and Procedures expressly impose on NERC the responsibility to ensure "that there is consistency, fairness of administration, and comparability of outcomes within each regional entity's certification and registration program among all of the programs (*Id.* Section 500, at 3.3). It is the height of arbitrary decision-making to administer regulatory or quasi-regulatory authority inconsistently when there is no justification for differential treatment.

2. FERC Should Reject NERC's Request For Clarification That It Need Not Specify Which Reliability Standards Are To Apply To An Entity Proposed To Be Registered

In the December 20 Decision, FERC stated that NERC's determinations to register the three RPMs as LSEs "do not adequately identify the Reliability Standards for which retail

marketers registered as LSEs would be responsible.” *Id.*, ¶ 35. FERC commented on the incoherence that surrounded ReliabilityFirst’s registration requirements:

The Commission believes that, while an improvement, the identification of the 11 Reliability Standards does not fully resolve the matter. For example, ReliabilityFirst expects retail marketers registered as LSEs to comply with Reliability Standard EOP-002-2. Yet, this Reliability Standard does not identify LSEs as an applicable entity. Likewise, ReliabilityFirst identifies another Reliability Standard, IRO-001-1, with which the retail marketers are currently required to comply in their role as purchasing-selling entities. ReliabilityFirst identifies other Reliability Standards applicable to LSEs, mostly pertaining to the provision of historical or forecast load data, which it believes retail marketers must comply with to assure that there is not *{sic}* gap in reliability. The retail marketers, on the other hand, claim that either they are not capable of compliance or their compliance would result in redundancies since other entities such as RTOs and balancing authorities already provide the data.

December 20, 2007 Decision, ¶ 46. ELCON agrees with the Commission that before an entity may be registered, NERC and ReliabilityFirst must identify a comprehensive set of Reliability Standards with which entities that are proposed to be registered must comply. If NERC or the regional entity is unable to identify such standards, one may infer that there is insufficient justification for registration and/or that NERC or the regional entity have not given sufficient thought to the risk of overlap or duplication. Of primary concern is NERC’s apparent willingness to make standards apply to functions that are never mentioned in the standards, as illustrated by NERC’s attempt to apply standards to RPMs that are never mentioned in the standards for purchasing-selling entities. It is essential that NERC standards clearly express which functions in NERC’s functional model are responsible for complying with the standard.

3. Improvements Are Needed To The Registration Process

Several aspects of the registration process as typified by this proceeding are of concern to ELCON.

First, NERC seems to be using the appeals process to impose on the entity proposed to be registered the burden to show that it should not be registered without developing criteria that

give clear notice to an entity that it must be registered. Over reliance on the appeals process imposes transaction costs on small market participants.

Second, although NERC Rule of Procedure 402.6 promises due process in the form of “adequacy of notice and opportunity to present facts and arguments at a hearing before an impartial arbitrator,” yet Strategic Energy asserts in its September 11 Appeal to FERC that it was not given the opportunity to respond to ReliabilityFirst’s assessment before the NERC Board of Trustees Committee.

Third, there is insufficient vetting of ongoing implementation of the *Statement of Compliance Registry Criteria*. While ELCON appreciates that FERC received these criteria as part of the certification process, and that as initially drafted they were vetted to some extent by ELCON and other groups, these criteria are being implemented in a black box without sufficient process to obtain input from affected parties. No stakeholder committee (including the Compliance and Certification Committee) is allowed to our knowledge to provide input to proposed changes to the *Compliance Registry Criteria* document. Accordingly, the key stakeholders do not have sufficient rights or protections. This procedural problem has substantive consequences. NERC and ReliabilityFirst have sought to justify registering an RPM that served 25 MW of retail load without finding that an individual facility was needed for reliability. If this “logic” is aggressively applied, regional entities could seek to register miniscule entities with vanishingly small potential impact on bulk power reliability.

Conclusion

For the foregoing reasons, ELCON respectfully requests that the Commission grant ELCON leave to intervene and consider ELCON’s comments on NERC’s Request for Clarification.

Notices And Communications

Notices and communications with regard to these proceedings should be addressed to:

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Respectfully submitted,

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Dated: February 1, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2008, I have caused a copy of the foregoing to be served by electronic mail upon those persons designated on the Official Service List for this proceeding.

Respectfully submitted,

/s/ W. Richard Bidstrup
W. Richard Bidstrup

Dated: February 1, 2008