UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Council	**:**	
and North American Electric Reliability Corp.	**:**	**Docket No. RR06-1-000**

MOTION TO INTERVENE AND COMMENTS OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL, THE AMERICAN FOREST & PAPER ASSOCIATION, THE COUNCIL OF INDUSTRIAL BOILER OWNERS, AND THE AMERICAN IRON AND STEEL INSTITUTE

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, and the Commission's April 7, 2006 Notice of Filing, the Electricity Consumers Resource Council (ELCON), the American Forest & Paper Association (AF&PA) the Council of Industrial Boiler Owners (CIBO), and the American Iron and Steel Institute (AISI) (together, Industrial Customers) hereby submit this Motion to Intervene and Comments regarding the application of the North American Electric Reliability Council and its affiliate, North American Electric Reliability Corporation (jointly, NERC) for certification as the Electric Reliability Organization (ERO) pursuant to Section 215 of the Federal Power Act, as added by Section 1211 of the Energy Policy Act of 2005 (EPAct 2005) (NERC's Application).[1]

I. DESCRIPTION AND STANDING OF INTERVENORS

ELCON is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing

[1] NERC also seeks Commission approval of its certificate of incorporation, proposed bylaws, and proposed rules of procedure, which accompanied its application and all of which will become the "ERO Rules." In a companion filing also made on April 4, 2006, and assigned to Docked No. RM06-16, NERC is seeking approval of its currently-effective reliability standards.

community. The member companies of ELCON consume approximately five percent of all electricity in the United States.

AF&PA is the trade association of the forest, pulp, paper, paperboard, and wood products industry in the United States. AF&PA's members are among the nation's largest consumers of electric power, purchasing over 82 billion kilowatt-hours of electricity annually nationwide. AF&PA's members include electricity consumers and producers.

CIBO is a national trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and universities representing 20 major industrial sectors. CIBO was formed in 1978 to promote the exchange of information between industry and government relating to energy and environmental policies, laws, and regulations affecting industrial boilers. Many CIBO members operate cogeneration facilities. CIBO's membership represents industries as diverse as chemical, paper, cogeneration, steel, automotive, refining, brewing, combustion engineering, and food production. CIBO members also include public and private universities, which operate boilers to run campus facilities.

AISI is the principal trade association of the North American steel industry. Its member companies account for about seventy percent of the new steel production in the United States. The steel industry is one of the most energy-intensive sectors in the United States; the cost of electricity may constitute as much as twenty percent of the manufacturing cost of a steel mill product.

Many ELCON, AF&PA, CIBO and AISI members may be subject to the NERC registration process and the reliability and other standards and rules issued by NERC, as approved by the Commission. Industrial Customers are interested parties and their intervention and participation will be in the public interest. Industrial Customers are not now, and will not be,

adequately represented by any other party in this proceeding, and may be bound or adversely affected by the Commission's action herein.

II. SUMMARY OF COMMENTS

NERC has made considerable progress to prepare itself to qualify for certification as the Electric Reliability Organization. Among NERC's laudable efforts include the naming of qualified, independent directors to its Board of Trustees, the hiring of a qualified senior management team and professional technical staff, some revamping of the stakeholder process to make it more inclusive, and improvements in its standards development process including, most notably, ANSI certification. However, it is essential that NERC's rules fully implement the statutory requirements of Section 215(c)(2) of the Federal Power Act calling for fair and equitable representation, participation and implementation of reliability standards and other functions of the ERO.[2]

A number of further changes to NERC's procedures and rules are needed in order to satisfy the statutory prerequisites to certification. These include:

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[2] Section 215(c)(2) of the Federal Power Act requires the certified Electric Reliability Organization to:

(A) assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure;

(B) allocate equitably reasonable dues, fees, and other charges among end users for all activities under this section;

(C) provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) (including limitations on activities, functions, or operations, or other appropriate sanctions);

(D) provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties; and

(E) provide for taking, after certification, appropriate steps to gain recognition in Canada and Mexico.

- NERC should defer user registration until FERC approves the registration criteria. Even though FERC, in Order No. 672, identified the scope of "users of the bulk power system" as a "critical jurisdictional term" and deferred decision on the issue until consideration of the proposed reliability standards,[3] NERC is proceeding with the registration process without yet having adequately defined the scope of affected facilities. In fact, NERC is still in the process of working on a registration criteria document that Industrial Customers understand may be a supplement to its pending application.
- Only industrial users truly qualifying as "users of the bulk power system" should be subject to registration and NERC reliability standards. Specific criteria are needed so that the NERC and regional standards and compliance programs apply only to (1) those entities and activities with direct, material and measurable impacts on bulk power system reliability, and (2) those users that have clearly been designated as the responsible entity as opposed to a public utility that would normally be expected to fulfill that responsibility. Entities should not be subject to registration if they do not own/operate facilities that are directly connected to and control the operation of the Bulk Power System or directly sell, purchase or transmit power over the Bulk Power System. In the following comments, Industrial Customers propose specific revisions to the NERC

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[3] FERC stated:

> We conclude that the precise scope of the term "User of the Bulk Power System," and thus the extent of persons subject to the Reliability Standards, would best be considered in the context of our review of those Standards, taking into account the views of the ERO and others. Therefore, until we have proposed Reliability Standards before us, we will reserve further judgment on whether a definition of "User of the Bulk-Power System" is appropriate or whether the decision of who is a "User of the Bulk Power System" should be made on a case-by-case basis.

Rules Concerning Certification of the Electric Reliability Organization and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672, Docket No. RM05-30-000 (Feb. 3, 2006).at ¶ 99.

criteria and clarification that the burden of proof for registering an industrial facility should be on the nominating entity.

- The proposed Member Representative Committee and Registered Ballot body should have the same stakeholder segments, with users – which under EPAct 2005 are responsible for 100 percent of the costs of the ERO -- given more representation.
- In view of NERC's new responsibilities, the technical "standing" committees should be consolidated into a single technical advisory committee.
- The proposed procedures relating to the Board of Trustees should be revised to enhance NERC's responsiveness to members' interests.
- The relationship between NERC and the regional entities should be clarified to provide NERC with strong top down authority and to promote uniformity in the registration process and in the development, implementation and enforcement of reliability standards.
- Fee assessments should avoid double billing and cost-plus accounting. The certified ERO should be a lean, responsive organization, learning from the unfortunate experiences of high cost ISOs and RTOs. Any request for new resources must be prudent, cost beneficial and improve the productivity of NERC and regional staffs.

Provided that the critical and necessary changes are made, Industrial Customers would support NERC's certification as the ERO. Pending such revisions and the granting of certification, however, NERC should suspend efforts to commence the registration process.

III. COMMENTS

A. Industrial Customers Support a Strong ERO That Implements Uniform Standards

Industrial Customers support the Commission's consistent statements in Order No. 672 that the ERO should be a strong, top-down organization that implements and enforces the registration process, reliability standards consistently throughout North America:

> The Commission concludes that a strong ERO with primary responsibility for performing all reliability functions is the preferred model for ensuring Bulk-Power System reliability. We believe that having primary authority reside in the ERO is essential in establishing a continent-wide self-regulating reliability organization…. The statute assumes a strong ERO.

Order No. 672 ¶ 654.[4] In this scheme, the regional entities are subsidiary to, and in fact are to be simply an extension of, the ERO.[5] To achieve the efficiencies that would result from such an organization, precise governing rules and consistent delegation agreements are needed.[6] The end result should be uniformity on a nationwide basis to the maximum extent feasible.[7] Industrial

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[4] *E.g.*, Order No. 672 ¶¶ 57 ("The Final Rule establishes the policy that, in general, the Commission oversees the ERO and the ERO oversees any approved Regional Entity."), 140 ("the Commission finds that a strong ERO is critical to maintaining Bulk-Power System reliability"), 654 ("The Commission concludes that a strong ERO with primary responsibility for performing all reliability functions is the preferred model for ensuring Bulk-Power System reliability. We believe that having primary authority reside in the ERO is essential in establishing a continent-wide self-regulating reliability organization…. The statute assumes a strong ERO").

[5] *E.g.*, Order No. 672 ¶¶345, 351, 423, 486, 506, 561, 654, 670, 676, 698, 772 ("The Final Rule establishes that, in general, the Commission oversees the ERO and the ERO oversees any approved Regional Entity"), 791.

[6] *E.g.*, Order No. 672 ¶¶ 670 ("The Final Rule adopts the criteria set out in section 215(e)(4) of the statute. Regional Entity applicants must enter into a delegation agreement with the ERO. The ERO should evaluate the Regional Entity applicant according to the statutory and regulatory criteria"), 676.

[7] *E.g.*, Order No. 672 ¶¶ 41 ("The Commission seeks as much uniformity as possible in the proposed Reliability Standards across the interconnected Bulk-Power System of the North 290 American continent"), 290 ("The Commission believes that uniformity of Reliability Standards should be the goal and the practice, the rule rather than the exception. Greater uniformity will encourage best practices, thereby enhancing reliability and benefiting consumers and the economy."), 291 ("The goal of greater uniformity does not, however, mean that regional differences cannot exist…. As a general matter, we will accept the following two types of regional differences, provided they are otherwise just, reasonable, not unduly discriminatory or preferential and in the public interest, as required under the statute: (1) a regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not; and (2) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System."), 294 ("The expected level of uniformity of continent-wide Reliability Standards and of Reliability

Customers' comments are guided by the principles that NERC's rules and standards, starting with the threshold applicability determinations, should establish clear, uniform and equitable criteria.

B. Only Industrial Users Truly Qualifying as "Bulk Power System Users" Should Be Subject to Registration and the NERC Reliability Standards

1. The Proposed Scope of "Bulk Power System Users" Is Overbroad

The proposed requirements for entities to register in the compliance registry are ill-defined and have the potential to sweep under ERO and regional entity jurisdiction hundreds or thousands of industrial facilities that have no material impact on bulk-power system reliability. This may needlessly impose significant costs on entities that do not belong in the registry. NERC's Application proposes open-ended criteria that are of little practical value: "A customer… would not in general…be considered a user..." or "An entity … would be considered to be a user … unless the entity was determined to have… no material impact on the bulk power system." (§ IV.C.1., page 62) The key phrase "material impact" is not defined. Qualifications such as "in general," "will generally be," and "if the consequences of an entity's actions or inactions could have a material impact... that entity may be considered a user ... " make it almost impossible for an entity to know with certainty whether it must register or not. On the other hand, Industrial Customers submit that the alternative suggestion in Order No. 672 to determine applicability on a case-by-case basis also would not function effectively. The issue then would arise every time a new standard is developed or an old standard revised.

Standards within an Interconnection should protect any owner or operator that moves from one Regional Entity to another from incurring a large cost"), 295, 464, 486, 712 ("As most commenters observe, there is value to consistency among the delegation agreements of Regional Entities. Industry participation should be able to conduct business in the same way from one Regional Entity to the next. Some standardization of the delegation agreement will facilitate uniformity in ERO-Regional Entity relationships, Regional Entity processes, accountability and enforcement of Reliability Standards. It may also help to minimize seams between regions").

Instead, what is needed are specific criteria that make the registration process efficient, cost-effective and consistent across regions and provide some reasonable degree of certainty such that the mere risk of penalties does not force all industrial facilities to register. The NERC and regional standards and compliance programs should be focused on those entities—which are primarily public utilities—who engage in activities with direct, material and measurable impacts on bulk power system reliability because it is their responsibility to maintain reliability for the benefit of all end users. To do otherwise could result in a loss of focus within NERC, the regions and registered entities on real improvement in system reliability, as the costs to document or measure compliance divert resources from actions that really improve reliability.

Many industrial manufacturing facilities include substations that are interconnected to the grid at transmission or subtransmission voltages. This does not *per se* make such facilities "elements of the bulk-power system." NERC has stated that it believes that Congress intended to exclude end users and facilities used in the local distribution of electric energy from a requirement to abide by the reliability standards for the bulk-power system. See NERC's Application at 60. Substations and other interconnection facilities, while often functionalized as "transmission," are, in fact, local distribution facilities regardless of the voltage or ownership. As such, these facilities are not elements that are part of the bulk-power system. It is ironic that manufacturing facilities that typically require higher levels of reliability and power quality than what the grid provide (and often have protection devices to isolate the manufacturing facility from the grid in the event of a disturbance on the grid) are proposed to become subject to regulatory requirements that ostensibly protect the grid from the manufacturer.

Industrial Customers recognize that an industrial facility served exclusively by Network Service under a wholesale transmission tariff (i.e., OATT) may in general be subject to a

requirement to register if the facility acts—i.e., purchases, sells, and transmits—in a utility-like manner. However, this is the rare exception rather than the rule. As an initial matter, Industrial Customers generally are supportive of two guiding concepts that have been propounded by NERC to focus the registration process: (1) a need for consistency between regions and across the continent with respect to which entities are registered, and (2) the need to register any entity reasonably deemed material to the reliability of the bulk power system, irrespective of other considerations. The natural converse is that NERC and its regional entities should ***not*** seek to register any entity that is unlikely to have a material impact on reliability. Further, Congress established and FERC reiterated jurisdictional boundaries that cannot be ignored in the registration and compliance program. These definitions should exclude distribution providers, retail customers, and generators that (a) do not own/operate facilities that are directly connected to and control the operation of the Bulk Power System or (b) directly sell, purchase or transmit power over the Bulk Power System.

Based on these principles, Industrial Customers recommend the following additions and clarifications to the criteria in Section 500 of the proposed Rules of Procedure (paragraphs 1.2.1 to 1.2.7):

- Industrial facilities should not be subject to registration if most of the service to the facility (including any QF sales from the facility) is subject to state jurisdictional tariffs or contracts. This includes situations in retail access states in which the manufacturer is served by a state-approved load-serving entity (LSE) that may be the load itself or an affiliate.
- Where services to purchase, sell, or transmit power over the bulk-power system are taken under the OATT, there should be an exemption if the net flow of power to or

from the bulk-power system is relatively small. A bright-line test for "small" would be to exempt any facility with loadings that can be accommodated at subtransmission voltages (i.e., less than 100 kV) regardless of the voltage of the interconnection to the bulk-power system and are otherwise incidental to the primary manufacturing process at the facility.

- Paragraph 1.2.5 in Section 500 proposes that "if the consequences of an entity's actions or inactions have no material impact on the bulk-power system," that entity should also not be considered a user of the bulk-power system. What is "material" has yet to be defined. Industrial Customers recommend the following test for materiality. If a written agreement including a tariff between the local Balancing Authority (BA) and/or Transmission Provider (TP) exists for the purpose of designating responsibility for the manufacturing facility's actions with the actions of the BA and/or TP as necessary to comply with one or more approved reliability standards, then this agreement would designate the entity responsible for compliance with any applicable reliability standards. In the absence of such a designation, the default entity would be the BA or TP. It is a natural part of any industrialized economy for large manufacturing facilities to shutdown or is added to the network. There is no evidence that, in the past, these occurrences threatened bulk-power system reliability or were not otherwise managed by a negotiated agreement between the applicable parties. The core responsibility for maintaining bulk-power system reliability should always be with public utilities unless other arrangements have been negotiated with the applicable customer. In the case of on-site, behind-the-meter

generation, the obligation to register should be limited to the entity obligated to provide backup power.

Industrial Customers understand that NERC is in the process of developing a Compliance Registry Criteria document that would address these issues and that may serve as a supplement to its application. Industrial Customers believe that these efforts have promise, as NERC has explicitly recognized that "the potential costs and effort of insuring that every organization potentially within the scope of 'owner, operator, and user of the bulk power system' is registered and included within the scope of the active compliance monitoring programs, while ignoring their impact upon reliability, would be disproportionate to the improvement in reliability that would reasonably be anticipated from doing so". However, this critical issue should be addressed as an integral part of NERC's application, and not on a separate track.

2. The Burden of Proof Should Be on the Entity Nominating an Industrial Facility

Under the proposed Rules of Procedure (Section 500, ¶ 1.3.5; Section 501.1), any entity could nominate an entity to the registry if that person believes that the entity was inappropriately excluded. Industrial Customers are concerned that without further clarification, this proposal may produce frivolous nominations that manufacturers will have to challenge at their own expense. At a minimum, the burden of proof must be on the nominating entity (including a regional entity) to demonstrate that the industrial facility is capable of impairing bulk-power system reliability notwithstanding the core responsibilities of the local Balancing Authority and Transmission Provider.

3. Applicability of Reliability Standards to Users of the Bulk Power System Should Be Clearly Specified for Each Standard

NERC's Application notes that Order No. 672 (at ¶ 99) states that "User of the Bulk-Power System" is "a critical jurisdictional term under Section 215." (§ IV.C.1., page 60) Section 302.1 of the proposed Rules of Procedure (page 8) appears to recognize this concept, stating that "Each reliability standard shall clearly identify the functional classes of entities responsible for complying with the reliability standard, with any specific additions or exceptions noted." This provision thus requires the compliance registry to somehow show which entities are subject to what standards. To more fully implement this concept, Section 501.1 of the proposed Rules of Procedure should be revised to more explicitly state that all entities in the Registry are not required to be under all of the standards. In the applicability portion of each section of the reliability standards, NERC should clearly specify whether and how the standards applies to "Users of the Bulk-Power System." NERC staff has informed Industrial Customers that the applicability of each standard may be stated in its applicability section of each standard. This point is not included in NERC's Application, but it is essential to for clarity and transparency.

4. The Registration Criteria Should Be Established and the ERO Certification Process Completed Before Registration Proceeds

Industrial Customers have substantial concerns that NERC and the regional entities are proposing to complete the initial compliance registration process now, before both the ERO and regional entity rules and the ERO Reliability Standards have been approved by FERC. NERC has indicated that it ***is registering*** additional organizations and confirming current compliance registration information ***at this time***. This is the case even though FERC's current schedule does not call for approval of NERC's Version 0 and Version 1 reliability standards until at least late summer or early fall. We understand that NERC needs to execute its plan to become the ERO;

however, it is premature to complete the compliance registry/functional registration process until FERC approval has been granted.

Thus, we are quite concerned that NERC appears to be proceeding with the registration process before giving all stakeholders an opportunity to offer comments on the Registration Criteria through an open NERC process before filing with FERC. This is not consistent with a fair, open and inclusive process. Further, it implies that FERC will "rubber stamp" the NERC proposal as offered. In these respects, it is inconsistent with FERC's directives in Order No. 672. NERC has authority to register owners, operators and users of the Bulk Power System, but only in accord with the Rules of the ERO and the applicable regional entities, as stated in ¶ 117 of Order No. 672 (see attached text, pasted below). Further, FERC was quite clear in ¶ 99 that it had concluded that "the precise scope of the term 'User of the Bulk-Power System,' and thus the extent of persons subject to the Reliability Standards, would be best considered in the context of our review of those Standards, taking into account the views of the ERO and others."

NERC appears to have the cart before the horse, since neither the ERO's rules nor its Reliability Standards have been approved by FERC after industry comment. Further, and perhaps more important, we have not even seen the corresponding rules of each of the regional entities who are charged with implementing the registration process. These rules will become attachments to the ERO-RE Regional Delegation Agreements, to be executed and submitted to FERC and posted for public comment only after NERC has been certified as the ERO.

Industrial Customers do not oppose ongoing efforts to plan for implementation of the compliance registry. However, we strongly recommend that the formal compliance registry process for entities that are not current NERC members or that have not voluntarily registered be deferred until after NERC has received certification as the ERO, filed and received approval of

each of the Regional Delegation Agreements and has received specific guidance from FERC as to the applicability and effective date for enforcement purposes of proposed reliability standards.

C. The NERC Committees' Membership, Structure, and Sector Definitions Should Be Rationalized

1. The Member Representative Committee and Registered Ballot Body Should Each Have the Same Stakeholder Segments, With Users Given More Representation

Apparently as a vestige of historic procedures, NERC has proposed to establish different stakeholder sectors for its two major policymaking committees, the Member Representatives Committee (MRC) that will elect the Board of Trustees, vote on any changes to the bylaws and provide advice and recommendations to the Board, and the Registered Ballot Body (RBB) that will approve proposed reliability standards to be submitted to the Board and ultimately to FERC for approval. As proposed, the MRC would have 12 voting sectors and the RBB would have nine voting sectors with generally different definitions of the sectors:

Member Representatives Committee (MRC)[8]	Registered Ballot Body (RBB)[9]
1. Investor-Owned Utilities	1. Transmission Owners
2. State/Municipal Utilities	2. RTOs, ISOs & Regional Reliability Organizations
3. Cooperative Utilities	3. Load-Serving Entities
4. Federal & Provincial Utilities/Federal PMAs	4. Transmission Dependent Utilities
5. Transmission Dependent Utilities	5. Electric Generators
6. Merchant Generators	6. Brokers, Aggregators & Marketers
7. Electricity Marketers	7. Large Electricity End Users
8. Large End-Use Electricity Consumers	8. Small Electricity End Users
9. Small End-Use Electricity Consumers	9. Federal, State and Provincial Regulators or Other Government Entities

[8] See NERC Application, § IV.A.1.b. at p. 35; NERC's proposed Bylaws, Art. II § 4.

[9] See NERC Application, § IV.B.1.A. at pp. 43-44; NERC's proposed Rules of Procedure §§ 305.1, 305.5.

10. ISOs/RTOs	
11. Regional Reliability Organizations	
12. Governmental Representatives	

Industrial Customers are unaware of any reasonable rationale for establishing two different sets of sectors. The same stakeholder sectors that vote on reliability standards should also vote to elect new Board members and bylaw changes. Having two voting bodies, with two different methods of allocating votes, is unnecessary, confusing, inefficient, costly, and potentially discriminatory to the extent that the two groups would not, by design, vote the same way on any given matter. Thus, as a threshold matter, the stakeholder sectors of the proposed MRB and RBB should be the same.[10] The proposed Bylaws (Art. II, § 3) show that it would be very simple to adopt the same segments for both the MRC and the RBB.[11]

Between the two proposed sector models for allocating voting rights, Industrial Customers favor the nine sector RBB approach, which is more balanced among users, owners and operators. The RBB approach has been demonstrated to work and work well in the establishment of NERC Standards. By contrast, Industrial Customers strenuously oppose the MRC approach, which would significantly reduce the representation of end-use consumers and skew it toward owners and operators, and the regions. In enacting EPAct 2005, Congress required that 100% of the costs of the ERO will be paid by end-use consumers. Users should have a far greater share of the vote than the approximately 11% (four out of 33-37 members) that would be allocated in the proposed MRC. Giving such a small percentage of the vote to the parties that will bear all of the costs would be inequitable.

[10] In fact, Draft I of NERC's ERO Application proposed precisely this structure. It was only after the regions exerted considerable pressure that NERC changed its original (and better) recommendation.

[11] See Proposed Bylaws Art. II, § 4; Art VIII, §§ 1, 3.

Moreover, the MRC approach would inappropriately give the regions at least 22% of the votes.[12] Inclusion of Regional Reliability Organizations (RROs) as an MRC sector raises conflict of interest concerns. Regional entities have a special relationship with the ERO that distinguishes them from true stakeholders: the regional entities are delegated the responsibilities to determine whether users, owners, and operators of the bulk-power system are in compliance with all applicable reliability standards, for conducting "proactive enforcement audits" and investigations, and for imposing penalties, sanctions or remedial actions for noncompliance. In other words, the regions are simply functional extensions of NERC itself. Allowing the regions to vote would substantially bias the voting process. The regions should be limited to non-voting status.

2. The Technical "Standing" Committees Should Be Consolidated Into a Single Technical Advisory Committee

NERC's proposed committee structure would overlap the existing, obsolete framework over the newer standards development oriented framework based on programs. See chart on page 25 of NERC's Application. In particular, preserving the Operating Committee and the Planning Committee would duplicate the efforts of the six program committees, and keeping the Operating Committee and the Planning Committee as they currently exist sends the signal of "business as usual."

Therefore, Industrial Customers propose that the Operating Committee and the Planning Committee be abolished and replaced with a single Technical Advisory Committee (TAC) that acts on an advisory capacity for each of the six Program Committees. The TAC would play a similar role in the standards development, compliance and certification, critical infrastructure,

[12] The weight of the regions could be even greater if the Canadian representatives are actually regional representatives. In Draft I of NERC's ERO Application, end users had 22% of the total vote. Moving from Draft I to the final Application reduced the end-user vote to 11% while giving the regions 22% of the vote.

and personnel training programs as the Members Committee would in advising the Board of Trustees. The TAC should consist of technically-oriented personnel, whereas the Members Committee could have policy-oriented personnel. A fresh start is a positive dynamic that will communicate to the population of industry experts and volunteers that the ERO is not the old NERC. The existing subcommittees, working groups, and task forces (called "technical subject matter expert groups") than could be reconfigured under the new program committees.

D. The Board of Trustees Should Be Responsive to NERC Membership

Revisions should be made to help ensure that the Board of Trustees does not become self-perpetuating or laden with conflicts of interest.

First, to enhance the Board's representativeness, the provisions in the proposed Bylaws addressing the Board Nominating Committee[13] should be revised. The number of Membership Committee representatives (MRC/RBB representatives in the current proposal) on the Nominating Committee should be increased from 3 to at least 5, and the Membership Committee should approve by a majority vote their representatives on the Nominating Committee. Two of the member representatives should be the representatives of large and small end-use customers. Customer representation is essential; after all, they ultimately pay 100% of the bills and bear the brunt of any lapse in reliability.

Second, the proposed bylaw calling for the Board to establish the compensation for Board members[14] should be changed. Instead, to avoid self-dealing, the MRC should determine the compensation of Board Members.

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[13] Proposed Bylaws Art. III, § 5.

[14] Proposed Bylaws Art. XIII, § 1.

E. The Relationship Between NERC and the Regional Entities Should Be Clarified

In order to fully implement the statutory mandate of EPAct 2005, NERC's bylaws and rules must establish NERC's strong top-down authority over regional entities. This requires NERC to break away from some of its historic practices.

The regions were the past owners of NERC and were the key decision-makers in the regime in which compliance with standards was strictly voluntary. In this regime, the regions were able to exercise considerable autonomy. EPAct 2005 changes this by creating the ERO (subject to FERC oversight in the US) with "top down" authorities. The regions should not be granted any residual authorities they had in the old regime (except where allowed by statute) and there should be no transition to the new end-state.

NERC's Application states that: "NERC will delegate to regional entities the responsibility for determining whether entities are in compliance with all applicable reliabilty standards and for imposing penalties for noncompliance." (§ IV.C.4., page 66) This evidences that the regions are simply extensions of the ERO, but clarification is needed so that the regions do not have the discretion to develop and implement inconsistent approaches. In order to fully implement the statute at the outset, Industrial Customers recommend the following:

First, all Delegation Agreements must be based on and consistent with a pro forma agreement. It is very important for FERC and the ERO to ensure consistency across regional entities for implementation of all delegated functions. See page 68 of NERC's Application.

Second, to the extent regional reliability standards are necessary for maintaining the reliability of the bulk-power system, NERC should ensure that such regional standards are reasonably consistent with the approved NERC standards. See pages 51-53 of NERC's Application. The Application says "to the maximum extent possible, regional differences will be

addressed through the NERC reliability standards development process…" (page 52). Industrial Customers believe that this should be revised to state that simply that "regional differences shall be addressed . . .".

Third, NERC's application quotes the Order No. 672 that there are only two types of "regional differences" -- (1) a regional difference that is more stringent than the continent-wide reliability standard, and (2) a regional reliability standard that is necessitated by a physical difference in the bulk-power system. See NERC's Application at 51-52. Industrial Customers strongly support this limitation.

Fourth, the procedures by which regional entities require the registration of users, owners, and operators of the bulk-power system must be the same across regions. A user with the same electrical characteristics must be treated the same (either as registrant or a non-registrant) in all regions. See NERC's Application at pages 66-67.

Fifth, Section 312.4 (page 21) of the proposed Rules of Procedure states that only "members" of the RBB that are located in the affected interconnection would be permitted to vote on regional variances. A justification for this exclusion should be made.

Finally, in Section 313.4.2 (page 25) of the proposed Rules of Procedure, a procedure for "Non-Interconnection-Wide Regional Reliability Standards" is proposed that differs from the regular standards development process. This provision says that: "NERC shall publicly notice and request comment on the proposed regional reliability standard, allowing a minimum of 45 days for comment." Such a standard should follow the regular process of developing a SAR, then a standard drafting team and the standard, etc. Industrial Customers recommend that this type of regional difference must follow the regular standards development process.

F. Care Must Be Exercised in How Fees Are Assessed and Used

Industrial Customers support the intent of NERC's proposal to minimize the potential for cross-subsidization.[15] Industrial Customers support the proposed requirement that NERC provide oversight of each regional entity's funding for its own statutory functions; NERC's Application states that: "NERC shall review and approve each regional entity's budget for adequacy in meeting the requirements of its delegated authority." (§ IV.F.3., page 73). This is consistent with a top-down relationship between the ERO and the regional entities. NERC should be responsible for approving the reasonableness and adequacy of each regional entity's budget. See page 72 of NERC's Application, page 11 in the proposed Delegation Agreement, and page 78 in the proposed Rules of Procedure.

Regional entities should be the collection agents, but NERC and FERC must provide the necessary guidance and controls to ensure that for ERO funding purposes, no double billing occurs for any funding entity such as the LSEs. The regional entities must account for instances in which NERC funding costs are also included in the rates of many Transmission Providers' Open Access Transmission Tariffs (OATTs) and other transmission services or power supply agreements, as is currently the case for many utilities. See page 75 of NERC's Application. If a layer of new billings is simply added without the elimination of the present costs in the tariffs, some consumers will be paying twice. The burden of proof should be on the entity collecting the funds to demonstrate that each OATT does not already include a funding mechanism for the ERO and regional entities.

[15] See page 72 of NERC's Application. The Application states that "NERC and the regional entities agree that costs of carrying out both NERC and the regional entities' statutory functions shall be equitably allocated among end users within the geographical boundaries of each regional entity and recovered through a formula based on NEL." (§ IV.F.4.a., page 74)

FERC also must ensure that the ERO and the regional entities do not duplicate the unfortunate experience of the high cost ISOs and RTOs, in which costs have greatly exceeded the expected benefits. The ERO and regional entities must not be allowed to develop a wasteful, "cost-plus" management style. See pages 70-71 of NERC's Application. To facilitate such oversight, Industrial Customers propose that the ERO and regional entities publish the identification of all entities responsible for funding ERO and regional entities' operations. See page 79 of the proposed Rules of Procedure.

Industrial Customers support the proposal that the allocation of funding requirements to any individual funding entity of less than one hundred dollars (US) should be waived. See page 74 of NERC's Application.

Industrial Customers' concerns with costs are well founded and were substantially elevated at the NERC Stakeholder and Board meetings on May 1 and 2. The first draft of NERC's proposed 2007 budget represents an increase of at least 20% over the 2006 budget. Additionally, there were several presentations regarding expensive "new tools" that may soon be recommended for implementation. While Industrial Customers strongly support tools and procedures to ensure an adequate degree of reliability, any request for new resources must be prudent, cost beneficial, and improve the productivity of NERC and regional staffs. At some point, even the slightest improvement to reliability comes at enormous cost. While manufacturers are first and foremost the defenders of a reliable bulk-power system, reliability at any cost is never justified. Ultimately the tradeoffs necessary to achieve adequate reliability should be made by consumers, both small and large because they pay all the costs to maintain reliability and suffer the consequences of any outages. But this requires changes in governance outlined in section III.C.1 of these comments.

G. Compliance Enforcement Must Be Independent and Uniform

Section 400 of the proposed Rules of Procedure, and in particular Section 403.1, 403.6, 403.11.4, and 405 address compliance with and enforcement of the reliability standards. However, the specified procedures are insufficient to ensure that compliance will be independent and uniform. It must be made very clear that Compliance Enforcement must be independent of the entity that is being enforced. No employee should be allowed to audit, monitor, etc. any entity from which that employee is paid. Moreover, to promote uniformity, at a minimum, the proposed Rules of Procedure should specify that NERC compliance staff shall participate in all regional entity audit teams.[16]

IV. NOTICES AND COMMUNICATIONS

The following persons are designated by Industrial Customers to receive service and communications on their behalf with regard to these proceedings:

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[16] *E.g.*, Order No. 672 ¶486 ("the ERO will retain oversight responsibility for enforcement authority that is delegated to a Regional Entity. Further, the ERO is ultimately responsible for how a Regional Entity conducts investigations.").

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V. CONCLUSION

For the reasons discussed herein, Industrial Customers respectfully request that the Commission grant this Motion to Intervene and condition approval of NERC as the ERO on the changes described in these comments.

Respectfully submitted,

/s/ Sara D. Schotland

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Dated: May 4, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail, the foregoing Motion to Intervene and Comments of the Electricity Consumer Resource Council, the American Forest & Paper Association, the Council of Industrial Boiler Owners, and the American Iron and Steel Institute upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ W. Richard Bidstrup

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Dated at Washington, D.C., this 4th day of May 2006.