

to continue its process of a “preliminary nonbinding” registration of entities that will be subject to the reliability standards. In a line of cases, most recently *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), the D.C. Circuit has ruled that an agency must not subdelegate its ultimate regulatory authority without specifying objective criteria to guide the private entity. FERC’s failure to establish such criteria while NERC proceeds with important and potentially burdensome quasi-regulatory activities fundamentally violates this precept.

2. Whether the NERC ERO Order grants excessive voting power to the ISO/RTO Council, regional entities, and regional reliability organizations, violation of the statutory directive requiring voting rights to be “balanced.” The ISO/RTO Council was given a separate segment even though it already has 1/3 of the votes in the Joint Interface Committee that includes NERC and NAESB. Regional entities and regional reliability organizations continue to have one vote per interconnection even though they are extensions of NERC and the statute requires NERC to delegate certain functions to them.

II. BACKGROUND

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 community. The member companies of ELCON consume approximately five percent of all electricity in the United States. In the absence FERC-issued criteria governing applicability of reliability standards, many ELCON members may be unwittingly subject to the NERC registration process and the reliability and other standards and rules issued by NERC,

notwithstanding the fact that they are customers of other entities that own and/or operate the interconnected grid and therefore have the core responsibility for maintaining reliability.

III. REQUEST FOR REHEARING

A. FERC Must Set Criteria Establishing the Scope of Registration Before Delegating the Registration Function to NERC

In its recent NERC approval order, FERC continues to defer consideration of the key jurisdictional terms that will define the scope of NERC's reliability standards. FERC stated:

[U]ntil we consider the scope and applicability of any approved Reliability Standard as it applies to users, owners or operators of the Bulk Power System, and we interpret and apply the Order No. 672 definition of the "Bulk Power System", as necessary, in the proceeding that addresses NERC's proposed Reliability Standards (Docket No. RM06-16-000), the matters of inconsistencies and clarity cannot be fully resolved with regard to NERC's proposed compliance registry process. Likewise, the complete registration of "users" of the Bulk Power System hinges upon the context and use of the term in a relevant Reliability Standards, and will be addressed by the Commission in Docket No. RM06-16-000. Once we have considered and approved a Reliability Standard and its scope and applicability, NERC's compliance registry should track our determination. The registry will be considered informative but not dispositive of who is subject to the Commission jurisdiction for reliability purposes as this is a matter ultimately for the Commission to decide. Accordingly, we find that NERC and the Regional Entities should not consider the list of registrants as final until the Commission has first considered the types of entities to which a particular Commission-approved Reliability Standard may apply.

NERC ERO Order ¶ 692. Similarly, FERC declined to act on ELCON's proposed exclusion for industrial facilities, *i.e.*, customers, served under a state jurisdictional tariff or contract, again on the basis that "[t]he final registration process cannot be completed until the Commission determines the scope and applicability of the particular Reliability Standards that it may approve in Docket No. RM06-16-000 or future proceedings involving proposed Reliability Standards."

NERC ERO Order ¶ 710.

Of particular concern is that, notwithstanding the continuing delay to address this critical threshold issue, the Commission declined to adopt ELCON's suggestion for additional

safeguards to prevent incorrect additions to the compliance registry. FERC stated that it “expect[s] that NERC or a Regional Entity would consider a third-party nomination only when it is accompanied by supporting reasons, as required by NERC’s Rules of Procedure.” ¶ 694. Moreover, notwithstanding ELCON’s comment that registration should not proceed until the registration criteria are established, FERC “urge[s] NERC and the Regional Entities to be as aggressive as practical in completing the preliminary nonbinding compliance registry prior to the Commission’s approval of any of the proposed Reliability Standards submitted in Docket No. RM06-16-000.” NERC ERO Order ¶ 714 (emphasis added).

Industrial customers not properly subject to reliability standards have a strong interest in avoiding improperly becoming registered, as in addition to the requirements of the reliability standards they would become subject to fees, inspections, and potential enforcement action. Order No. 672 ¶¶ 96, 100, 111, 455, 476, 479, 551.

1. Proceeding with an Arbitrary and Burdensome Registration Process Without Objective Criteria Is an Improper Delegation to a Private Entity

In order to satisfy due process and achieve regulatory uncertainty, FERC cannot further delay definition of the key jurisdictional term “user of the bulk power system.” Case by case determinations under each reliability standard alone would not function effectively, as the issue would arise repeatedly every time a standard is developed and revised, and creates the prospect of regional variation.

FERC's delegation of authority to NERC to implement an interim bulk power user registration requirement violates the subdelegation doctrine due to the lack of pre-established objective criteria. Time and again, the D.C. Circuit and other U.S. circuit courts of appeal have cautioned that an agency must not subdelegate its ultimate regulatory authority. ELCON does not argue that FERC lacks statutory authority to delegate reliability to NERC; rather new Section

215 of the Federal Power Act assumes that the approved ERO will implement reliability standards. The problem is FERC's failure either to articulate objective criteria or to require that NERC adopt pre-established objective criteria.

The courts have expressed special concern where authority is delegated to private organizations. In this case, NERC is not only a private organization, but consists of market participants. As the D.C. Circuit noted in a recent case:

[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. *See* NARUC, 737 F.2d at 1143 n.41; *cf.* Printz v. United States, 521 U.S. 898, 922-23, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," Stanton, 54 F. Supp. 2d at 20, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.

United States Telecom Ass'n v. FCC, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

The D.C. Circuit case law is clear that pre-established criteria are an essential precondition for lawful delegation. In a case approving the Federal Election Commission's delegation of debate staging authority to a private body, the Commission on Presidential Debates, the court expressly noted the pre-established objective criteria:

For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate....

Perot v. FEC, 97 F.3d 553, 556 (D.C. Cir. 1996). Moreover, here there is special concern because the subdelegation will occur to an organization dominated by market participants such as investor owned utilities where questions of conflict of interest will arise:

NPS cannot, under the unlawful delegation doctrine, completely shift its responsibility to administer the Niobrara to a private actor, *Perot v. Federal*

Election Comm'n, 321 U.S. App. D.C. 96, 97 F.3d 553, 559 (D. C. Cir. 1996), particularly a private actor whose objectivity may be questioned on grounds of conflict of interest. *Sierra Club v. Sigler*, 695 F.2d 957, 962 (5th Cir. 1983).

...

The relevant statutes and legislative history are clear that NPS retains its statutory obligation to manage and administer the Niobrara. Even though NPS is required to consider the recommendations of the Advisory Commission, and NPS may enter into cooperative agreements with local entities in carrying out its obligations, the fact remains that the administration of such areas is still the responsibility of NPS. Nothing in the statutes or legislative history gives NPS the discretion to completely abdicate its responsibilities to a local entity.

National Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 20 (D.D.C. 1999).

We emphasize that the potential for conflict of interest is even greater here because while NERC has an independent board, under NERC's proposal -- which is subject to change as control of NERC is a contentious, unresolved issue -- selection of the board and other NERC matters subject to vote would be dominated by utilities, many of whom will have a direct stake in the control of transmission to favor their own generation. Thus decisions made in the name of reliability may not be objective if precise criteria are not pre-established by the Commission.

2. Pursuant To The Statutory Criteria, Industrials Are Not Subject To Reliability Standards Unless They Materially Impact The Grid

FERC should adopt a definition of user that excludes entities unlikely to have a material impact on reliability. In the alternative, if FERC continues to postpone resolution, then NERC should suspend efforts to include an entity on the compliance registry upon the filing of a simple notice of objection.

All end-use customers (regardless of size) should be subject to exclusion except in case where a state has taken some action to convert certain users of local distribution into users of the bulk power system. The statutory text provides support for this position. Under new Section 215(b)(1) of the Federal Power Act, reliability standards are to apply to "users . . . of the bulk-

power system.” The bulk-power system consists of “(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) electric energy from generation facilities needed to maintain transmission system reliability.” However, excluded from the definition of “bulk-power system” are “facilities used in the local distribution of electric energy.” Section 215(a)(1). Accordingly, the statute does not apply to users only of local distribution facilities

The statutory exclusion for users only of local distribution facilities would apply to most industrials, which are state-jurisdictional retail customers and therefore, by definition, users of local distribution facilities. To give meaning to each provision in the statute, it is necessary to identify a category of users of more than local distribution facilities that should be subject to reliability standards. Accordingly FERC should: (1) recognize, as NERC already had done (see NERC Application at 60), that the exclusion for end users and facilities used in local distribution means that the guiding criterion should be potential for material impact on bulk power system reliability; (2) recognize that only users engaging in utility-like functions, i.e., wholesale generation and transmission, have potential for material impact on reliability; and (3) establish specific criteria so that the reliability standards and associated registration requirements are applied uniformly only to those entities with direct, material and measurable impacts on bulk power system reliability.

ELCON set forth proposed criteria in its Motion to Intervene and Comments on NERC’s application. ELCON submits that FERC incorrectly failed to address the comments and that it must do so now to avoid an improper delegation to a private entity. In summary, ELCON proposes the following:

- 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. The sole exception should be if a written agreement including a tariff between the local Balancing Authority (BA) and/or Transmission Provider (TP) designates responsibility to the industrial facility for complying with one or more approved 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 shut down or be 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.

- 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. Even where services to purchase, sell, or transmit power over the bulk-power system are taken under the OATT, however, 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. Such a user would not have a material impact.

Motion to Intervene and Comments of Industrial Customers, Docket No. RR06-1-000 (May 4, 2006) at pp. 7-14.

ELCON’s proposed criteria are consistent with the test that the Commission articulated with respect to whether facilities are used for local distribution in the context of unbundled retail service in Order 888 is the seven-factor test. The seven-factor test is the following:

- (1) Local distribution facilities are normally in close proximity to retail customers.
- (2) Local distribution facilities are primarily radial in character.
- (3) Power flows into local distribution systems; it rarely, if ever, flows out.
- (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market
- (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area.
- (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.

(7) Local distribution systems will be of reduced voltage.

Order No. 888 at p. 402.

3. Unnecessary Registration Efforts Are Imposing
Immediate Burdens on ELCON Members

In the absence of FERC-established and approved criteria, but with carte blanche from FERC to pursue the registration process, regional entities are beginning to register a broad range of entities, including entities with no potential for “material” impact on the bulk-power system. For example, a regional entity recently nominated one of ELCON’s members and assigned it to the “purchasing-selling entity” (PSE) category. The company’s facility has no generation in the region and has a total load much less than 25 MW that is also capable of interruption. A subsidiary of the company is a FERC-authorized wholesale power marketer, although the marketing affiliate only does business in another region of the country and the facility at hand gets all its power from the local distribution company even though the facility is located within an organized market. This company is a classic example of an entity that should not be subject to registration, as it has no obvious “material” impact on bulk-power system reliability. In addition, wholesale power marketing in organized markets involves purely financial transactions; they are not physical trades. Therefore they have no consequence on the RTO’s operation of its grid. The whole purpose of Day 2 markets is to separate the commercial market from the physical dispatch and operation of the grid. Thus, an allegation that a large industrial customer may be a PSE in an organized market is not a valid reason to nominate the customer for the registry.

Likewise, ELCON members who are QFs also should not be subject to registration. All such facilities must contract for backup services to protect the host plant. Such backup services

prevent any ‘material’ impact of the QF on the grid; instead, the backup service provider should be the entity responsible for the registry requirement.

FERC should proceed to promptly establish criteria for registration consistent with Section 215 of the FPA and, in the interim, suspend the efforts of NERC and regional entities to register industrial customers and others that do not impact the bulk-power system. While ELCON does not oppose the application of the NERC functions and responsible entities as a template for identifying candidates for the registry, it is obvious that these functions and entities need to be qualified and clarified to preclude needless nominations—especially before any attempt to apply them to customers. It is not a trivial matter to be nominated to the registry. ELCON knows from discussions with its members who have already been solicited for registration that the simple nomination process is a huge and costly distraction to the company and its management.

B. The ERO Order Gives Excessive Voting Rights to the IRC, REs and RROs

New Section 215(c)(2)(A) of the Federal Power Act requires NERC rules to “assur[e] fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure.” FERC has recognized that voting rights in NERC’s ballot bodies should achieve “balance”. NERC ERO Order ¶ 89. In two respects, however, the July 20, 2006 Order would give disproportionate representation to particular entities.

First, FERC added a requirement that the ISO/RTO Council be given a separate voting segment in the registered ballot body, with the effect of increasing their voting percentage to about 10 percent. NERC ERO Order ¶ 89. In doing so, FERC apparently did not consider that the ISO/RTO Council already has one-third of the votes in the Joint Interface Committee (“JIC”)

that includes NERC and the North American Energy Standards Board (“NAESB”). The JIC plays a critical role in the development process for reliability standards, while a primary function of the registered ballot body is to vote on such standards. In its application to serve as the ERO, NERC described the JIC’s role as follows:

The JIC’s purpose is to ensure that the development of wholesale electric business practices and reliability standards is harmonized and that every effort is made to minimize duplication of effort between NERC and the North American Energy Standards Board (NAESB). The JIC is staffed by representatives of NERC, NAESB, and the ISO/RTO Council and is governed by the provisions of a Memorandum of Understanding executed by the three entities. The JIC will review all standards development proposals received by NERC and NAESB to determine whether NERC or NAESB should develop a particular standard. The JIC will also coordinate the annual workplans of the three organizations.

NERC Reliability Standards Development Procedure (Appendix 1), Dec. 8, 2005, at p. 9.

Accordingly, the ISO/RTO Council already has a substantial voice in establishing reliability standards at a managerial level. The purpose of the registered ballot body should be to represent the views of other stakeholders. ELCON requests that FERC reconsider its position in view of the role of the JIC.

Second, the NERC ERO Order reduces but does not eliminate the voting rights of regional entities (“REs”) and regional reliability organizations (“RROs”).¹ FERC recognizes that NERC’s proposal to give REs and RROs 25 percent of the vote would be disproportionate. FERC goes to recognize that participation of REs raises potential for conflict on issues such as budgets. Nonetheless, FERC indicates that having single RE or RRO participant from each Interconnection on the member representatives committee would provide adequate representation. NERC ERO Order ¶ 75. Later, of even greater concern, FERC states that “in

¹ Elimination of voting rights for REs and RROs would also eliminate the need for a separate voting segment for regional bodies.

addition to the regional reliability organizations, the Regional Entities should also be represented on the registered ballot body,” without specifying any limit on their voting percentage. NERC ERO Order ¶ 90. The REs and RROs are subsidiary to, and in fact are to be mere extensions of, NERC. E.g., Order No. 672 ¶¶ 345, 351, 423, 486, 506, 561, 654, 670, 676, 698, 772. The statute authorizes delegation of functions to them. *See* FPA § 215(e)(4); 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.”). Any voting participation, even if diluted as suggested by the NERC ERO Order, inherently raises conflict of interest issues and turns upside down the structure calling for the REs to be subordinate to NERC. The Regional Entities and Regional Reliability Organizations should have no voting rights.

ELCON recognizes that FERC has directed NERC to revisit and justify its voting bodies in a subsequent compliance filing. However, FERC should revise and clarify the guidelines set out in the NERC ERO Order to ensure that NERC achieves the statutory requirement of balanced decisionmaking.

IV. CONCLUSION

For the reasons stated herein, ELCON respectfully requests that its Request for Rehearing be granted. ELCON respectfully requests that FERC promptly establish the specific criteria outlined above to govern applicability of NERC reliability standards and the registration process, and in the meantime suspend registration. Otherwise, as registration is commencing now, FERC will have improperly delegated a regulatory function to a private entity without as a threshold matter establishing sufficient criteria to govern the private entity’s action. The likely outcome is inconsistency, confusion, and imposition of burdens on industrial customers seeking to avoid or overturn incorrect applicability and registration decisions.

Further, ELCON requests that FERC revise and clarify its allocation of voting rights to avoid giving excessive voting power to the ISO/RTO Council, regional entities and regional reliability organizations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2006, 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.

/s/ – W. Richard Bidstrup
W. Richard Bidstrup

Dated: August 18, 2006