

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

Rules Concerning Certification of the
Electric Reliability Organization; and
Procedures for the Establishment,
Approval, and Enforcement of Electric
Reliability Standards

Docket No. RM05-30-000

Comments of the
Electricity Consumers Resource Council (ELCON),
American Iron and Steel Institute (AISI),
American Chemistry Council (ACC),
Council of Industrial Boiler Owners (CIBO), and
Portland Cement Association (PCA)

The Electricity Consumers Resource Council (ELCON), the American Iron and Steel Institute (AISI), the American Chemistry Council (ACC), the Council of Industrial Boiler Owners (CIBO), and the Portland Cement Association (collectively, Industrial Users) appreciate the opportunity to comment on the Commission's proposed amendments to its regulations to incorporate the requirements of Subtitle A of the Electricity Modernization Act of 2005. Subtitle A added a new section 215 to the Federal Power Act.

Introduction

Industrial Users are long-standing advocates of a strong ERO with enforcement authority for the simple reason that End Users, including large manufacturers and their

employees, bear the brunt of power outages. The blackout of August 2003 was a national disgrace to the extent that a single utility's failure to properly manage the vegetation within its transmission corridors resulted in billions of dollars of economic damages to the US and Canadian economies.¹ The member companies of Industrial Users operate on both sides of the border and in many other foreign markets. Clearly, world-class industries cannot continue to operate in societies that tolerate only voluntary compliance with reliability standards and the unacceptable level of blackouts that clearly result from such discretionary compliance.

Industrial Users are concerned that grid reliability may be at risk during the transition to competition because the widespread application of market-based rates is encouraging anti-competitive, opportunistic behavior before adequate market or regulatory safeguards are in place.² Such behavior has the potential to test the limits of the reliability standards developed by NERC, its successor ERO, or regional reliability councils, thus jeopardizing the security of the bulk power system. Congress in the Electricity Modernization Act of 2005 gave FERC additional authority to police market power abuses and impose stiff penalties—penalties intended to be sufficient to deter harmful behavior and mitigate any economic incentive to breach reliability standards.

¹ See Electricity Consumers Resource Council, *The Economic Impacts of the August 2003 Blackout*, February 9, 2004.

² Recommendation 12, of the US-Canada Power System Outage Task Force's *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations*, states that "DOE and Natural Resources Canada should commission an independent study of the relationships among industry restructuring, competition in power markets, and grid reliability, and show how those relationships should be managed to best serve the public interest." ELCON was invited to sponsor one of ten white papers that were commissioned as part of the independent study. See John P. Hughes, *Reliability Risks During the Transition to Competitive Electricity Markets*, Electricity Consumers Resource Council, August 2005. The white papers can be downloaded from: <http://www.energetics.com/meetings/reliability/papers.html>.

With the new law, there is reason to hope that FERC now has both the authority and responsibility to ensure reliability and honest market operation.

But the enactment of these statutory provisions is only an essential first step for assuring reliable and honest market operation. In ELCON's August 2005 White Paper, we recommend a series of actions at the federal level to address the transitional risks to grid reliability.³

The first recommendation is directly related to this rulemaking on the certification of the ERO. Specifically, it is essential that this rulemaking preserves the intent of the law and is not used to preserve the fragmented lines of authority that currently exist between NERC, regional councils, RTOs and transmission owners. The development and enforcement of reliability standards must be done on a "top down" basis with plenary authority for both functions residing with the ERO subject to the oversight of FERC and its Canadian counterparts. Any deference or delegation of these functions must not be an excuse to preserve some market advantage or allow opportunistic behavior.

Furthermore, the implementation of the reliability legislation is an once-in-a-lifetime opportunity for FERC and the new ERO to think "outside the box" and develop a truly world-class reliability organization. FERC should resist efforts to preserve outmoded, existing industry governance structures, relationships, and habits that prevent a world-class organization from emerging from the ERO certification process. The same lack of initiative and inertia in the industry that has resulted in a severely under-built infrastructure is preventing longer-term needs related to grid reliability.

³ *Id.* at 10.

Summary of Comments

- The Strawman #4 Recommendations of the Post Legislation Steering Committee should be adopted.
- FERC should also be guided by the “Principles” of the Bilateral Electric Reliability Oversight Group.
- The Funding Mechanism for the ERO and each Regional Entity should be based on the “Net Energy for Load” principle.
- Charging End Users any additional fees or dues as a pre-condition to “Membership” in the ERO or Regional Entity is discriminatory and contrary to the statutory mandate of equitable allocation of reasonable dues, fees, and charges.
- Barriers to membership jeopardize the statutory objective of fair stakeholder representation and balanced decision-making because they discourage End-User participation.
- The existing NERC Registered Ballot Body Process with its nine industry segments is a workable template for the governance structure of the ERO and each Regional Entity. Regional Entities should not be “members” of the ERO for the same reason that the ERO itself would not be a member.
- The ERO should review and approve the budgets of each Regional Entity.
- FERC should strive for reasonable consistency among the Regional Entities in regard to Delegation Agreements, interpretation and enforcement of standards, and budgets.
- Regional Entities should not have their own Regional Standards that are not subject to ERO or FERC Review.

Comments

A. The Strawman #4 Recommendations of the Post Legislation Steering Committee Should Be Adopted.

NERC's Post Legislation Steering Committee (PLSC) was appointed by the NERC Board of Trustees in 2004 to oversee NERC's development of an application to FERC for certification as the ERO under the reliability legislation. The PLSC comprises representatives from all of the stakeholder groups that constitute the NERC community. ELCON, representing large industrial consumers, has participated in all aspects of the process that lead to the enactment of Subtitle A and is an active participant in the PLSC.

On August 9, 2005, the PLSC issued its "Suggested FERC Regulations to Implement Reliability Legislation" (also known as "Strawman #4"). It was an attempt to develop a consensus rule for implementing the legislation. The document is the product of lengthy discussion—and compromise—among PLSC members. The parties are in agreement that this document provides a good starting point and framework for the Commission's rulemaking. Industrial Users appreciate the fact that the Commission's proposed rule did, in fact, adopt many of the concepts in Strawman #4.

Consensus on some issues was not achieved by the PLSC. The list of issues for which consensus was not achieved was attached to Strawman #4. We believe that these issues will frame most of the debate in the rulemaking process. Industrial Users' recommendations with respect to these issues are in sections C through I below.

B. FERC Should Also Be Guided By The "Principles" of the Bilateral Electric Reliability Oversight Group.

On August 3, 2005, the Bilateral Electric Reliability Oversight Group (Bilateral Group) issued its "Principles for An Electric Reliability Organization That Can Function

on an International Basis.” The Bilateral Group consists of representatives from the US Department of Energy, FERC, and the Federal-Provincial-Territorial Electricity Working Group (FPT Group) in Canada. The Bilateral Group’s “Principles” were vetted in stakeholder workshops in both the US and Canada. Like the Strawman #4, the “Principles” are intended to guide the establishment of an ERO that can function effectively in the US and Canada. Industrial Users strongly support the Bilateral Group’s “Principles.”

C. The Funding Mechanism for the ERO and Each Regional Entity Should be Based on the “Net Energy for Load” Principle.

The funding mechanism for recovering approved ERO and Regional Entity costs should be net energy for load (NEL), which represents the electric energy consumption of end-use customers.⁴ Approved costs include only costs necessary to meet the requirements of FPA § 215. Other costs incurred by the ERO or Regional Entity should be recovered with user fees. Examples of such other costs are operator training and certification. The NEL collection mechanism should be a FERC tariff levied on Balancing Authorities. The ERO should disperse the funds for each Regional Entity’s budget after the US portion of the ERO’s total budget has been approved by FERC.

To implement our recommendation, the following definition should be added to § 38.1:

Net Energy for Load means the electric energy consumption of end-use retail customers which is calculated by adding system net generation, energy received from other suppliers, losses, and minus energy delivered to others through interchange.

⁴ NEL is comprised of system net generation, plus energy received from others, plus losses, less energy delivered to others through interchange. Historically, NERC allocates most of its budget on the relative NEL of the Regional Reliability Councils, which are the actual members and owners of NERC. NERC prorates its assessments using NEL energy values for the second year preceding the budget year.

In addition, § 38.3(b)(2)(ii) should be amended to read:

(ii) Allocate equitably and on a non-discriminatory basis reasonable charges among end users for all activities under this section. The Electric Reliability Organization is prohibited from allocating any additional dues or fees to End Users that duplicate charges already assessed;

In addition, § 38.13(c) should be amended to read:

(c) Any person who submits an application for certification as the Electric Reliability Organization pursuant to the rules set forth in this section shall include in such application a plan for the allocation and assessment of the Electric Reliability Organization and Region Entities charges. Such plan shall assess charges to every Balancing Authority on a relative Net Energy for Load basis. The certified Electric Reliability Organization may subsequently file with the Commission a request to modify the plan from time-to-time in the Electric Reliability Organization's discretion.

D. Charging End Users Any Additional Fees or Dues As a Pre-condition to “Membership” in the ERO or Regional Entity is Discriminatory and Contrary to the Statutory Mandate of Equitable Allocation of Reasonable Dues, Fees and Charges.

The legislation requires an “equitable” allocation of “reasonable dues, fees, and other charges among End Users for all activities” of the ERO (§ 215(c)(2)(B)). Any fee or dues is a barrier to participation to some entities. Even a “nominal” membership fee that is minimal to utilities that can pass through these charges can be a barrier to customers or other similarly situated stakeholders. Since the legislation requires all costs of the ERO to be directly charged to End Users, charging dues or membership fees in addition to the allocation to End Users of the § 215 costs would be inequitable, discriminatory and contrary to statutory objectives of consumer protection. Neither End Users, nor any other one group of stakeholders, should be saddled with duplicative charges.

To implement our recommendation, a new § 38.3(b)(2)(vi) should be added:

(vi) Assure that stakeholder participation in the activities of the Electric Reliability Organization is not restricted in any manner by the assessment of membership dues or fees, or by any other barrier to participation.

E. Barriers To Membership Jeopardize the Statutory Objective Of Fair Stakeholder Representation And Balanced Decision-Making Because They Discourage End-User Participation.

All stakeholders should be allowed to participate in the affairs of the ERO and Regional Entities on an equal and non-discriminatory basis to meet statutory objectives. Membership barriers preclude such participation.

Ideally, there should be no membership requirements in the ERO and Regional Entities. Membership implies that there are non-members and this contradicts the statutory mandate for “fair stakeholder representation.” If there are members, what rights are being denied to non-member stakeholders? The concept of membership and the issue of barriers to membership must be carefully considered by FERC to avoid re-incarnation of ERO as a “utility club.” (Dues requirements and perquisites of membership should not be confused with the requirement that that all entities subject to enforcement under § 215(e) register with the ERO for administrative purposes.)

If, in spite of this concern, a membership requirement is allowed, we believe that anyone that wants to participate in the ERO should be allowed, upon their request, to become a member of the ERO without any explicit or implied barriers to membership.⁵ At a minimum, End Users (both small and large) should be allowed to participate without paying dues so as to assure balanced participation.

⁵ Any organization has a right (and at times, a need) to establish rules of conduct that can deny participation to individuals or organizations that engage in rude or disruptive behavior. An example could be a rule established by a committee and approved by the ERO by a super majority that allows the committee to refuse participation by an individual that has demonstrated unacceptable behavior.

The classic distinction between members and non-members is that only members vote. If End Users are deterred from membership in the new ERO their views are as likely to be overlooked as in the old NERC regime, which existed for years as a utility-only club, no end-users or competitive entrants need apply.

F. The New NERC Registered Ballot Body Process With Its Nine Industry Segments is a Workable Template for the Governance Structure of the ERO and Each Regional Entity.

NERC's existing nine Industry Segments for the new Registered Ballot Body should be the template for the committee structure at ERO and each Regional Entity.

The members of each Segment should elect their representatives to a Stakeholders Committee (as is done within NERC today when the members of the Registered Ballot Body elect their representatives to the Standards Authorization Committee). Such election should be conducted through an open process within each segment. This is a process that has been proven to work and does not cause administrative problems.

The current industry segment structure of the NERC standing committees should not be adopted for the structure of the ERO committees. The current standing committee structure gives regional councils 37% of the membership on each committee. The Regional Entities established under the ERO should not have this voting right for the same reason that the ERO itself should not be a member with voting rights. Regional Entities are an administrative extension of the ERO. The large apportionment of votes to the regional councils in the NERC standing committees was in recognition of the fact that the regional councils were the sole source of funding for NERC, and it was in their interest to provide oversight of how the funds were expended. This funding role was eliminated by the new § 215 of the Federal Power Act.

Clearly equal representation between producers and consumers in any weighted voting system is the best means for ensuring “fair stakeholder representation” and “balanced decision making” given that at the highest level there are only two stakeholder groups: producers (and their affiliates) and consumers. This will assure outcomes that are not detrimental to consumers or producers. Since End Users will directly pay for all § 215 activities of the ERO and Regional Entities, we recommend that at the start, End Users should have at least 37% of any weighed vote to ensure the same oversight and accountability as afforded the regional councils in NERC standing committees.

End Users should not be required to have the same number of participants in the governance process; their vote simply should equal at least 37% of the total vote.

The Stakeholders Committee should directly elect the members of the Board, vote on by-laws and amendments to the by-laws, and vote on other governance issues.

Anyone with any interest in the bulk power system should be eligible to participate in ERO and Regional Entity committees with no restrictions applied.

A proposed tenth Segment reserved for Canadians, as some parties may propose, is inappropriate and should not be established. The Canadians who would otherwise be eligible for this new Segment should be encouraged to join and participate in one or more of the other nine Segments that all too often may be under-populated based on recent experience at NERC and NAESB. However, if FERC allows a special segment for Canadian representation, it must ensure that they do not become over-represented.

Voting should be according to the process used in today’s standards development process at NERC. A lot of stakeholder effort went into designing that process and it is worth preserving at the ERO and each Regional Entity.

To implement our recommendation, a new definition should be added to § 38.1:

Stakeholder Committee means a standing committee of stakeholder representatives.

In addition, new sections § 38.3(b)(2)(vii) and § 38.3(b)(2)(viii) should be added:

(vii) Adopts a fair, open, balanced, and inclusive stakeholder committee structure consisting of nine Industry Segments: (1) Transmission Owners; (2) Regional Transmission Organizations, Independent System Operators, and Regional Entities; (3) Load-Serving Entities (LSEs) that do not own or operate, or are related to entities that own or operate generation, transmission, or distribution facilities; (4) Transmission-dependent Utilities; (5) Electricity Producers; (6) Brokers, Aggregators, and Marketers; (7) Large End Users; (8) Small End Users; and (9) Federal, State, and Provincial Government Entities. The Electric Reliability Organization shall impose no restrictions on the number of stakeholders participating in each Industry Segment. Each Industry Segment shall elect two representatives to serve on a Stakeholder Committee.

(viii) The Stakeholder Committee shall elect the directors of the Electric Reliability Organization, approve the by-laws of the Electric Reliability Organization, and from time-to-time amend such by-laws.

G. The ERO Should Review and Approve the Budgets of Each Regional Entity.

Industrial Users believe that each Regional Entity should submit to the ERO its annual funding requirements for all activities related to its delegated or assigned authorities. The submission should include supporting materials in sufficient detail to justify the requested funding requirement as reasonable and prudent for performing the activities related to its delegated or assigned authorities in an efficient and cost effective manner, for inclusion in the ERO's filing to FERC.

This recommendation is based on Industrial Users' support for a strong "top down" hierarchy for developing and enforcing reliability standards.

To implement our recommendation, a new § 38.7(g) should be added:

(g) An approved Regional Entity shall annually submit to the Electric Reliability Organization its budget, including supporting material, for the delegated and assigned activities under this section. Upon approval of the budget by the Electric Reliability Organization, and after opportunity for review and comment by the Stakeholders Committee and FERC approval, the Electric Reliability Organization shall disperse funds to an approved Regional Entity.

H. FERC Should Strive for Reasonable Consistency Among the Regional Entities In Regard to Delegation Agreements, Interpretation and Enforcement of Standards, and Budgets.

The members of Industrial Users have major manufacturing facilities that may include on-site, behind-the-meter generation in multiple regions of the North American continent. It is the nature of the global marketplace that dictates the need for the same standards everywhere so they can operate their business in the most efficient manner possible. The interconnected grid exists solely to serve the needs of End Users such as manufacturing facilities and therefore the development and enforcement of reliability standards is for the convenience of End Users, not the utilities, generators or regional entities.

While we recognize that there are some material differences in the way different interconnections and sub-regions are planned and operated (e.g., Quebec), we are wary that many claims for “regional differences” are really attempts to preserve a life style, to avoid change, to avoid modernization of the grid, or preserve a competitive advantage.

With the exception of regions that qualify under the § 215(e)(4) “Interconnection-wide” presumption, or § 215(i) savings clause, the burden of proof should always be on a “region” to demonstrate that it requires separate treatment that departs from the treatment of other Regional Entities.

I. Regional Entities Should Not Have Their Own Regional Standards That Are Not Subject to ERO or FERC Review.

The current NERC standards manual recognizes regional standards that are not NERC standards. This is the legacy of voluntary compliance, and this must change with the implementation of the Electricity Modernization Act of 2005. All reliability standards in the US and Canada must be ERO Reliability Standards that are approved by FERC and its counterparts in Canada. Notwithstanding the savings clause of § 215(i)(3) that applies to actions by the States, any Reliability Standard that is meant to address such a State action should be vetted in the ERO process to ensure that no conflict with ERO Standards and no lessening of reliability outside the applicable State.

Responses to Selected Questions Posed by the Commission

1. (¶ 8) *On August 9, 2005, the Federal-Provincial-Territorial (FPT) Working Group in Canada and DOE jointly submitted to the Commission “Principles for an Electric Reliability Organization that Can Function on an International Basis” (bilateral principles) based on these stakeholder dialogues. We invite comment on those principles.*

Industrial Users Response: Industrial Users strongly support the principles.

2. (¶ 42) *We seek comments on what would constitute a reasonable length of time for such periodic certification [of the ERO] to be effective. For example, is a five-year certification period appropriate? How far in advance should an ERO be required to submit its application for recertification before its current certification period expires?*

Industrial Users Response: A five-year certification period is reasonable. The amount of lead-time necessary to process an application for recertification might best be determined after FERC and stakeholders experience the first certification effort.

3. (¶ 43) *We seek comments on whether the term “end users” should be defined for purposes of the ERO’s equitable allocation of reasonable dues, fees and charges among end users? Should “end users” be defined as customers using net energy for load? Should the term “end users” be defined in terms of those who directly or indirectly use the transmission system since “Bulk-Power System” is defined to exclude facilities used in local distribution of electric energy? Should “end users” be limited to entities transmitting electricity through*

the transmission facilities of others? Or, might "end users" include the transmission facility owners and operators whose businesses depend on the reliable operations of the interconnected Bulk-Power System?

Industrial Users Response: End Users should be defined as retail customers that are not primarily in the generation, transmission and/or distribution business.

4. *(¶ 48) Proposed Section 38.4(b)(3) provides that the Commission will not defer to the ERO or a Regional Entity with respect to the effect of a Reliability Standard or modification to a Reliability Standard on competition. How should the Commission define "competition" in this context? Commenters are asked to provide examples regarding the effect of a Reliability Standard on competition.*

Industrial Users Response: Competition in this context should be defined as situations in which one or more parties to a transaction are authorized to sell at market-based rates and the "effect" of any standard on competition is the ability of a market participant to use the standard to influence the price of a transaction or discriminate against a competitor, or to give preferential treatment to one class of market participants.

5. *(¶ 54) The Commission seeks comment on whether the Commission has authority to void a previously accepted Reliability Standard. If the Commission has such authority, is it beneficial to have such a provision in the Commission's regulations?*

Industrial Users Response: The Commission has the authority to void a previously accepted Reliability Standard and should provide for such authority in its regulations. With the rapid pace of technological change and market evolution it should not be presumed that once a standard has been deemed just, reasonable, not unduly discriminatory or preferential, and in the public interest, that it will always be so.

6. *(¶ 57) Also, should the ERO certification criteria specify that the number of board members representing each participating country in the ERO, and the opportunities for each country to have an equitable number of members on all committees, must be in rough proportion to total load?*

Industrial Users Response: Yes. In addition, with respect to committees, as long as it is only the “opportunity” and the Commission has clearly specified the criteria to be used to define representatives of participating countries.

7. *(¶ 63) The Commission seeks comment on this proposal [regarding non-public procedures for enforcement matters involving a cyber security incident] and, in addition, seeks comment on (1) whether the proposal provides sufficient due process and (2) the identification of other specific events that should be subject to non-public hearing procedures.*

Industrial Users Response: The proposal regarding non-public procedures for enforcement matters involving a cyber-security incident is appropriate and provides sufficient due process. Other events should not qualify for the non-public hearing procedures without compelling evidence that it would not otherwise be in the public interest.

8. *(¶ 71) (7) Who should receive, and what should be done with monies collected as monetary penalties? Should the monetary penalties collected by the ERO or Regional Entity be used to defray the cost of its enforcement program, or allocated to some other use? Would allowing the ERO or Regional Entity to use penalty money to fund an enforcement program create an appearance of impropriety?*

Industrial Users Response: The monies should be kept in escrow and used as a direct offset to the ERO’s budget request for the budget year following the enforcement action.

9. *(¶ 71) (8) The Commission notes that the bilateral principles include a provision calling for rigorous audits by the ERO and Regional Entities to ensure the capability to comply with and actual compliance with the Reliability Standards. The bilateral principles also provide for the ERO to take steps to ensure that auditors are properly trained and that the same audit standards apply to all audits conducted by the ERO and Regional Entities. Should the proposed rule specify these audits requirements as part of the ERO certification requirements and the Regional Entity certification and delegation requirements?*

Industrial Users Response: Yes.

10. *(¶ 71) (9) The Commission notes that the bilateral principles provide that RTOs and ISOs should not become Regional Entities, and that the Regional Entities should be distinct from*

the operators of the system, such as RTOs and ISOs. Should the proposed rule mandate this? What are the enforcement implications of an RTO or ISO that is a Regional Entity? Are there ways for an RTO or ISO to adequately separate its enforcement function from its ownership, use or operation of the Bulk-Power System to fully ensure the independence of the enforcement unit? What process should such an enforcement unit follow to insulate itself from its RTO or ISO organization so that it may undertake any enforcement actions that become necessary against the RTO or ISO? How would this comport with the requirements of section 215 of the FPA?

Industrial Users Response: The final rule should prohibit RTOs and ISOs from qualifying as Regional Entities for the purpose of enforcement of the Reliability Standards. As grid operators, RTOs and ISOs cannot audit and enforce themselves. It is a clear conflict of interest.

11. *(¶ 71) (10) Paragraph (e) of proposed section 38.5 states that the Commission may order compliance with a Reliability Standard and may impose a penalty if the Commission finds that the user, owner or operator of the Bulk-Power System has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a Reliability Standard. Should the Commission clarify in the rule that, in a situation where an entity is about to engage in an act that will constitute a violation of a Reliability Standard, Commission action will be in the form of a compliance order with the goal of preventing the violation from occurring; and further clarify that an entity that has engaged in an actual violation may be subject to both penalties and a compliance order? Are there situations that may warrant penalties where an entity is about to engage in activity that would violate a Reliability Standard but the activity was ultimately averted?*

Industrial Users Response: The Commission might consider imposing such penalties on an entity that is about to engage in a violation if that entity has a record of multiple actual violations in the past.

12. *(¶ 71) (11) Paragraph (g) of proposed section 38.5 requires that the ERO and all Regional Entities have in place procedures to notify the Commission of all violations and potential violations of Reliability Standards when the ERO or Regional Entity first notifies the user, owner or operator of the violation or potential violation. We seek comment on what confidentiality protections may be needed, particularly with regard to potential violations. For example, the Commission currently maintains confidential protection of other types of enforcement-related investigations pursuant to section 1b or our regulations, 18 C.F.R. § 1b (2005). Are similar protections needed here?*

Industrial Users Response: Similar protections are appropriate, but the Commission should not let claims for confidentiality be used to hide business practices that harm reliability or competition.

13. (¶ 72) *The Commission seeks comment on the feasibility and appropriateness of adopting a reliability assessment program similar to the NRC's nuclear power plant assessment program. Also, should the Commission establish a reliability watch list modeled on the NRC's Action Matrix? What features of the NRC program should the Commission adopt? What other features might be added?*

Industrial Users Response: This would seem to be an effort that would duplicate a basic responsibility of the ERO.

14. (¶ 73) *The Commission asks commenters to discuss which aspects of the INPO's programs would serve as useful models for the ERO. What lessons can be drawn from INPO's complementary role with the NRC?*

Industrial Users Response: It should really be the responsibility of the industry to promote excellence. However, it may be helpful if the Commission's final rule sets a high bar for compliance with Reliability Standards to motivate the industry to set high standards of excellence. The Commission needs to overcome the tendency of economic regulation to tolerate mediocre behavior.

15. (¶ 76) *What mechanism of review and methods of oversight should be used to assure the Commission that the ERO or a Regional Entity is meeting its responsibilities for monitoring compliance with the Reliability Standards?*

Industrial Users Response: The Commission's authority to audit the ERO or Regional Entity may be supplemented with a review by an independent auditor. The burden of proof that the ERO or Regional Entity is meeting its responsibilities is with the ERO or Regional Entity.

16. (¶ 77) *With respect to any monetary penalties levied directly by the Commission against the ERO or a Regional Entity for violation of the FPA, should the ERO or a Regional Entity be able to recover such penalties through dues, fees, or other charges?*

Industrial Users Response: No. Allowing the recovery of the costs completely negates the penalty. Thus the only meaningful penalty is the risk of decertification or bankruptcy.

17. (¶ 78) *Section 215(e)(5) of the FPA provides that, “[t]he Commission may take such action as is necessary or appropriate against the ERO or a Regional Entity to ensure compliance with a Reliability Standard or any Commission order affecting the ERO or Regional Entity.” Since the ERO and Regional Entity provisions of the Electricity Modernization Act of 2005 are modeled on the SRO provisions of the securities law, and under those provisions, the Securities and Exchange Commission can impose monetary and non-monetary penalties on SRO board members, should the Commission adopt the same approach with respect to the board members of the ERO and Regional Entities?*

Industrial Users Response: No. The ERO (or a Regional Entity) is not the same as the SRO to the extent that the ERO is providing an essential service. The risk of penalties will only discourage people from wanting to serve on the ERO board. The risk of decertification and the personal embarrassment to board members of such an outcome is the appropriate penalty.

18. (¶ 80) *A Regional Entity may also propose Reliability Standards to the ERO, that, if ultimately approved by the Commission, would become regional variances in a specific region. Any such regional variances would be ERO variances, not Regional Entity Reliability Standards, since it would be the ERO, not the Regional Entity that submits the proposed Reliability Standard to the Commission for its review. The Commission anticipates that any such regional variances would supplement ERO Reliability Standards, not substitute for them. The Commission seeks comment on this interpretation.*

Industrial Users Response: Industrial Users support this interpretation. We also believe that every effort should be made to avoid the need for variances in the first place. There must be a very heavy burden of proof on the part of any Regional Entity that proposes regional variances. Variances, by definition, are inconsistent with the purpose and benefit of standards.

19. (¶ 84) *The Commission seeks comment on the following related issues: (1) Should the Commission prescribe a size, scope, or configuration requirement for the Regional Entities? And, if so, what should it be?*

Industrial Users Response: Ideally, Regional Entities should be interconnection-wide entities. If the Commission approves smaller entities, such entities should have the same geographical footprint as an ISO or RTO.

20. (¶ 84) (2) *What is the role of the Regional Entities in relationship to the ERO?*

Industrial Users Response: As stated in the NOPR (¶ 80), Regional Entities may enforce the ERO Reliability Standards and propose Reliability Standards to the ERO that may become regional variances in a region if approved by FERC.

21. (¶ 84) (3) *Beyond enforcement and the proposal of Reliability Standards to the ERO, what, if any, additional authority should the Regional Entities be given?*

Industrial Users Response: Nothing under § 215 of the FPA as amended.

22. (¶ 84) (4) *Should the ERO be required to submit a standardized form of delegation agreement concurrently with the ERO application that would delineate a uniform relationship between the ERO and all Regional Entities or should delegation agreements be tailored to the individual needs and circumstances of each region and the ERO and submitted for approval as they are executed by the parties?*

Industrial Users Response: FERC should require the ERO to prepare a pro forma Delegation Agreement, and allow deviations from the pro forma DA only in extreme cases with the burden of proof on the region to show the need for the deviation.

23. (¶ 84) (5) *To what extent should the ERO, when delegating responsibility to Regional Entities, require uniform processes in matters including, but not limited to, governance, collection of dues and fees, compliance monitoring, and enforcement action procedures?*

Industrial Users Response: There should be a uniform process given that they are all doing the same thing.

24. (¶ 84) (7) *What, if any, responsibility or involvement should the ERO have with regard to the funding of the Regional Entities?*

Industrial Users Response: The ERO should compare and contrast the budgets of each Regional Entity (RE) before approving any Regional Entity's budget to ensure

that only costs that are prudent and in line with other REs are actually allowed. The REs should not have their own funding mechanism for delegated functions. The ERO should disperse funds to each RE after FERC approval. The ERO would assess charges with a FERC-approved tariff on Balancing Authorities to collect sufficient revenues for the ERO and Regional Entities' budgets.

25. (¶ 84) (8) *Should the certification and delegation criteria for a Cross-Border Regional Entity specify that each country represented in the region should have the opportunity to have members from the country on the board of the Regional Entity in numbers that reflect the country's approximate percentage of net energy for load in that region, similar to that provided in the bilateral principles?*

Industrial Users Response: Yes. See response to question 6 (regarding ¶ 57).

26. (¶ 84) (9) *Should the Commission set the standard by which Regional Entity applications to the ERO will be reviewed or should the ERO be allowed to determine this standard? Given that section 215(e)(4) of the FPA requires that the ERO and the Commission shall rebuttably presume that a proposal for a Regional Entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power reliability, should a higher standard apply to Regional Entities that are not organized on an Interconnection-wide basis? What should the higher standard specify? Should a Regional Entity not organized on an Interconnection-wide basis have the burden to demonstrate that it has appropriate regional scope and configuration to promote effective and efficient administration of Bulk-Power System reliability?*

Industrial Users Response: The ERO should set the standard by which Regional Entity applications to the ERO are reviewed subject to Commission approval. All Regional Entities should meet the same standards.

27. (¶ 84) (10) *Paragraph (f) of section 38.7 requires a Regional Entity approved by the Commission to periodically submit to the Commission an application to be re-approved as a Regional Entity. We seek comments on what would constitute a reasonable length of time for such periodic re-approval to be effective. For example, is a five-year approval period appropriate? How far in advance should a Regional Entity be required to submit its application for re-approval before its current approval period expires? What role, if any, should the ERO have in the re-approval process? Would the ERO have to resubmit a delegation agreement?*

Industrial Users Response: A five-year approval period is appropriate to start with and may subsequently be shortened if the Regional Entity is charged with repeated violations. The Regional Entity should file with the Commission its application for re-approval one year before the end of its five-year term. The ERO should be allowed to submit comments to the Commission regarding the qualifications of the Regional Entity seeking re-approval. The Commission should not approve an application for re-approval if the ERO opposes such re-approval with cause. The ERO should resubmit a delegation agreement if material circumstances changed since it was originally consummated.

28. (¶ 84) (11) *Section 215(e)(4) of the FPA and proposed regulation section 38.7(c)(3) require that the ERO, when filing a delegation agreement, include a statement demonstrating that the agreement promotes effective and efficient administration of Bulk-Power System reliability. What standards, guidelines, measures or criteria should the Commission apply in determining whether a delegation agreement promotes effective and efficient administration of Bulk-Power System reliability? If the primary function of a Regional Entity is enforcement of Reliability Standards, in what ways will Regional Entities bring effective and efficient administration in the enforcement function?*

Industrial Users Response: The burden of proof is on the Regional Entity that it will “bring effective and efficient administration in the enforcement function,” not the Commission.

29. (¶ 91) *The Commission seeks examples of situations or areas of concern in which commenters believe that conflicts between reliability standards and Transmission Organization tariffs exist or may arise.*

Industrial Users Response: Industrial Users has no such examples at this time. However, we believe that the Commission’s NOI in docket number RM05-25-000 (“Preventing Undue Discrimination and Preference in Transmission Services”) may identify such situations or areas of concern.

30. (¶ 94) *In addition to comment on the proposed regulation discussed above, the Commission seeks comment on the scope of the term “region” as used in section 38.10. In*

particular, should the region represented by a Regional Advisory Body correspond to that of an existing or proposed Regional Entity?

Industrial Users Response: Of course the region represented by a Regional Advisory Body (RAB) should correspond to the Regional Entity. Further, if the Regional Entity later changes its geographical scope and configuration, the RAB should also change to match that scope and configuration.

31. (*¶ 103*) *In addition to comments on the proposed ERO funding regulations, the Commission asks for comments on the following questions: (1) Should the proposed funding requirements be extended to the Regional Entities?*

Industrial Users Response: Regional Entities should not have their own funding mechanism to recover the costs of section 215 activities. The ERO should collect the funds necessary for its budget and the budgets of the each Regional Entity.

32. (*¶ 103*) *(2) The Commission notes the bilateral principles include several funding principles: (a) a principle specifying that net energy for load should be the primary basis upon which the costs of the ERO are assigned and that costs for one region or entity should be directly assigned to that region or entity; (b) a principle specifying that funding mechanisms, budget direction and budget levels should reflect consultations with appropriate stakeholders and authorities in each country; and (c) a principle specifying that the appropriate authorities in each country should be responsible for approving and ensuring cost recovery by the ERO and Regional Entities within their respective jurisdictions in a timely manner. Should the proposed rule address these types of funding-related details or should the ERO and Cross-Border Regional Entities have the discretion to address these matters at a later time?*

Industrial Users Response: The final rule should be consistent with the bilateral principles and explicitly so.

Respectfully submitted,

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