

I. MOTION FOR LEAVE TO ANSWER

The Commission's rules generally do not permit the filing of answers to protests; however, the Commission has granted leave to file such answers if they clarify the issues in dispute, ensure a complete and accurate record, or otherwise provide information that will assist the Commission in its decision-making process.⁵ To ensure that the Commission has complete and accurate information upon which to make a decision on the RDAs, NERC requests leave to submit this response to the LPPC Protest as well as comments from Snohomish, APPA and TAPs, and the Joint Parties.

II. BACKGROUND

On June 26, 2015, NERC submitted its Petition for approval of the *pro forma* RDA as well as the individual RDAs between NERC and the eight Regional Entities. On June 26, 2015, the Commission issued notice of a comment period ending on July 27, 2015. Ten entities moved to intervene in this proceeding.⁶ Six of the nine Commenters are either located in the Western Electricity Coordinating Council ("WECC") footprint or represent entities located in the WECC footprint. The Commenters raise the following three questions:

⁵ See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 108 FERC ¶ 61,219, at P 14, n. 17 (2004) (answer was accepted as it "provided information that assisted [the Commission in its] decision-making process"); *Mich. Elec. Transmission Co., LLC*, 106 FERC ¶ 61,064, at P 3 (2004) (the permitted answer "provides information that clarifies the issues and aids us in the decisional process"); *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062, at P 24 (2006) (reply comments of NERC and others accepted "because they have provided information that assisted us in our decision making process"); *N. Am. Elec. Reliability Corp.*, 117 FERC ¶ 61,091, at P 18 (2006) (same); *N. Am. Elec. Reliability Corp.*, 119 FERC ¶ 61,248, at P 6 (2007); *N. Am. Elec. Reliability Corp.*, 127 FERC ¶ 61,209, at P 5 (2009).

⁶ (1) APPA, (2) TAPS, (3) Avista Corporation; (4) California Department of Water Resources State Water Project; (5) Idaho Power Company; (6) LPPC; (7) Portland General Electric Company; (8) Snohomish; (9) Puget Sound Energy, Inc.; and (10) Tri-State Generation and Transmission Association, Inc.

- (1) whether Section 7 of the *pro forma* RDA should provide an exclusive list of activities that are either eligible for Section 215 funding or not eligible for Section 215 funding;
- (2) whether the proposed revisions to the *pro forma* RDA weaken NERC's oversight over the Regional Entities; and,
- (3) whether the Commission should accept the proposed automatic renewal provision in the *pro forma* RDA.

In this answer, NERC answers all three questions. First, it is unnecessary, and unduly restrictive, to require an exhaustive, all inclusive list of activities that may or may not be eligible for Section 215 funding in the *pro forma* RDA, because the annual business plan and budget process provides the opportunity for the Commission to review each Regional Entity's proposed activities and related costs and determine whether they are eligible and appropriate for funding through the statutory assessment process. Second, the proposed revisions to the *pro forma* RDA enhance the ERO's ability to exercise oversight over the Regional Entities and streamline the ability of the ERO to issue a directive. Third, the proposed automatic renewal provision in the *pro forma* RDA does not prevent the Commission from examining the operations of the ERO and the Regional Entities for a ten-year period. To the contrary, NERC is required to examine the operations of the ERO Enterprise, including each Regional Entity, as part of the five-year ERO performance assessment in 2019 and again in 2024. In turn, the 2019 and 2024 ERO performance assessment reports will provide the Commission with opportunities to review the ERO Enterprise's operations and activities, including those of each Regional Entity and to identify opportunities for improvement.

III. ANSWER

a. **The Annual Business Plan and Budget Process Negates the Need to Provide an Exhaustive List in the *Pro Forma* RDA of Activities That May or May not be Eligible for Section 215 Funding.**

In its protest, LPPC states that while it “does not quarrel with the list of [delegation-related] activities NERC provides” in the [*pro forma* RDA], the list of activities “...must either be an exclusive list or affirmatively restricted to NERC’s statutory responsibilities.” LPPC and the remaining Commenters concede that these questions regarding the scope of NERC’s statutory authority and the related scope of delegation-related activities for the Regional Entities in the *pro forma* RDA stem from recent Order No. 1000 discussions about whether WECC should engage in regional planning activities and in the administration of energy markets.⁷ Snohomish and the Joint Parties highlighted similar concerns about the activities listed in the *pro forma* RDA.

The *pro forma* RDA is an agreement delegating authority to a Regional Entity to perform Section 215 activities (Sections 4, 5 and 6) and also tasking the Regional Entities to assist NERC by performing specified delegation-related activities in certain subject matter areas (Section 7). The activities delegated in Sections 4, 5 and 6 are the activities that the ERO is expressly authorized to delegate to Regional Entities pursuant to Section 215(e)(4)(A) of the Federal Power Act,⁸ while

⁷ LPPC Protest at pgs. 3-4; *see also* Snohomish at pg. 3 (“The *pro forma* RDA should make clear that delegated-related activities described in Sections 5, 6, and 7 of the RDA do not include the administration of either (i) transmission planning activities (e.g., a regional transmission planning process under Order No. 1000), or (ii) commercial activities (e.g., an energy market). Among the entities and groups in the WECC footprint, some have suggested that WECC take a larger role in the development of energy markets in the West. Others have suggested that WECC undertake the transmission planning obligations under Order No. 1000, which are currently performed by regional planning entities, such as Columbia Grid.”). Snohomish and the Joint Commenters raised the same issue in their comments. *See* Snohomish Comments at pg. 1 (“Snohomish requests that the Commission direct NERC to exclude transmission planning and commercial activities from the list of delegated-related activities in the [proposed] *pro forma* RDA as beyond the scope of Section 215 of the Federal Power Act (“FPA”).”); *see also* Joint Commenters Comments at pg. 18 (“...Section 7 of the WECC Delegation Agreement fails to provide sufficient definition and detail to allow the Commission, NERC and the industry to able to readily identify what should be funded under FPA section 215 and what activities should not.”).

⁸ 16 U.S.C. § 824o(f)(4)A).

the delegation-related activities listed in Section 7 are all activities that fall within NERC's Commission-approved Section 215 criteria.⁹ The operative language in Sections 4 through 7¹⁰ of the proposed revised *pro forma* RDA, which describes the delegated functions and the delegation-related activities, appears in all eight RDAs and is language that the Commission has previously approved in earlier versions of the RDAs.¹¹ However, NERC (and the Regional Entities) cannot use Section 7 of the *pro forma* RDA to unilaterally expand the list of activities that a Regional Entity can perform, and be funded by statutory assessments, because of the annual business plan and budget process. This annual opportunity provides stakeholders and the Commission to review the activities proposed by each Regional Entity and the related budgeted costs and determine whether the activities are eligible and appropriate to be funded through statutory assessments. Given the requirement to submit the Regional Entity business plans and budgets to the Commission for approval on an annual basis, it is unnecessary to include an exclusive list of delegation-related activities in the *pro forma* RDA.

It appears that some Commenters' concerns spring from recent discussions regarding WECC's potential involvement in Order No. 1000 activities. However, these issues should be treated as outside the scope of this proceeding, the purpose of which is to review the proposed revised *pro forma* RDAs and the conforming revised individual RDAs. In the case of LPPC, its members' concerns relate to what they think may be proposed as future activity.¹² Snohomish's

⁹ *Order on Compliance*, 143 FERC ¶ 61,052 at P 29 (2013) ("Section 215 Order").

¹⁰ Section 7 of the RDA provides that "[t]hese delegation-related activities shall include, but are not limited to..." (Emphasis added).

¹¹ *See* Order Conditionally Approving Revised Pro Forma Delegation Agreement, Revised Delegation Agreements with Regional Entities, Amendments to Rules of Procedure and Certain Regional Entity Bylaws, 133 FERC ¶ 61,061 (Oct. 21, 2010); *see also* Compliance Filing of the North American Electric Reliability Corporation in Response to October 21, 2010 Commission Order, Docket No. RR10-11-000 (Feb. 18, 2011) (hereinafter "2011 Petition"); Order on Compliance Filing, 137 FERC ¶ 61,028 (Oct. 7, 2011).

¹² *See* LPPC Protest at pg. 4.

concerns are described as “suggestions” from some unnamed entities or groups in the WECC footprint.¹³ Neither comments reference any proposal from WECC. Any decisions regarding Regional Entity activities, whether inside or outside the scope of Section 215, and their associated budget and funding aspects, should be addressed in the annual business plan and budget development processes and approval proceedings (in which stakeholders have ample opportunities to participate and express their views about their respective Regional Entities’ activities and costs), not in this proceeding.¹⁴ NERC acknowledges that confirmed, non-statutory activities are described in section 6 of Exhibit E to the individual, Regional Entity RDAs; however, this is to ensure that such activities do not compromise the Regional Entity’s oversight role or independence.¹⁵

Therefore, the Commission should reject the Commenters’ request that the RDAs be required to include an exhaustive, all-exclusive list of activities that are either eligible or ineligible for Section 215 funding.

b. The Proposed Revisions to the *Pro Forma* RDA Strengthen Its Oversight over the Regional Entities.

APPA and TAPS contend that the revised *pro forma* RDA weakens NERC’s oversight authority. To the contrary, the proposed revisions to the *pro forma* RDA enhance the ERO’s

¹³ See Snohomish Comments at pg. 3.

¹⁴ WECC is required to include both statutory and non-statutory proposed activities in the development and approval process of its annual business plan and budget (both internally to WECC and in WECC’s submission to NERC). See, Exhibit E to the WECC RDA, Parts 2 and 6. An activity included in a business plan and budget would be subject to examination and any dispute would be resolved in the context of the business plan and budget development process and approval proceeding.

¹⁵ See *N. Am. Elec. Reliability Council*, 119 FERC ¶ 61,060 at P 257 (2007) (citing *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062 at P 580 (2006) (“Finally, the *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, i.e., non-FPA Section 215, non-reliability regulator activities, then it must list them in Exhibit E. The identification of non-statutory activities performed by a Regional Entity is necessary to ensure that such activities do not compromise the Regional Entity’s oversight role or independence.”)

oversight of Regional Entity activities in three key ways. First, the requirement for NERC to audit the Regional Entities has not been eliminated; this requirement remains in NERC Rule of Procedure 402.1.3. Proposed Section 8(f) of the revised *pro forma* RDA provides that all such periodic reviews, not only CMEP audits, must continue to comply with the NERC Rules of Procedure and Commission directives. Second, the amended *pro forma* RDA reflects the ERO's current oversight and monitoring of the Regional Entities, which occurs on a continuous basis and as frequently as reasonably required. Finally, the *pro forma* RDA is updated to include additional oversight tools and areas of compliance in the form of guidance and policies and procedures. While these oversight tools are developed in collaboration with the Regional Entities, the collaboration itself does not dilute NERC's authority vis-à-vis the Regional Entities. Rather, the revised RDA strengthens NERC's authority by streamlining the directive process and eliminating the ability to appeal a proposed directive to the NERC President in Section 8(c).

Together, these revisions solidify the ERO's position as the "primary authority" in the ERO Enterprise as contemplated by the Commission.¹⁶

c. The Automatic Renewal Provision Does Not Eliminate the Commission's Ability to Assess the NERC-Regional Entity Relationship.

APPA and TAPS challenge the proposed automatic renewal provision of the *pro forma* RDA, stating that if it is triggered, the *pro forma* RDA will not be examined again by the Commission for review until 2025. However, NERC has committed to its Board of Trustees to review the RDAs as part of each five-year ERO performance assessment, which NERC is required to undertake pursuant to the Commission's ERO regulations. NERC's next required ERO

¹⁶ See *Rules Concerning Certification of the Electric Reliability Organization and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672 at P 654.

performance assessment report, which must include an assessment of the Regional Entities' performance, is due in 2019; review of this report will provide the Commission with the opportunity to review the RDAs. The purpose of the ERO performance assessments is to examine how effectively the ERO Enterprise, including the Regional Entities, is operating and to identify opportunities for improvement. In its orders on the performance assessments, the Commission has an opportunity to direct NERC to address operational challenges and identify whether those challenges are best addressed through program changes, Rules of Procedure changes or changes to the RDAs. If the Commission identifies any opportunities for improvement in its order on the 2019 performance assessment, NERC and the Regional Entities will have sufficient time to issue notice to terminate the RDAs and prevent the triggering of the automatic renewal, so that they can develop a revised RDA that addresses the Commission's directives or concerns.

Therefore, the proposed automatic renewal provision does not affect the Commission's ability to review the effectiveness of ERO Enterprise operations and the activities of NERC and the Regional Entities during the next five years.

IV. CONCLUSION

For the reasons set forth above, NERC respectfully requests that the Commission grant this motion, deny the LPPC Protest, issue an order consistent with the arguments herein, and approve the proposed revised *pro forma* RDA and the revised individual RDAs, to be effective January 1, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 10th day of August, 2015.

/s/ Nina H. Jenkins-Johnston

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