



Protest. Accordingly, NERC seeks leave to file this Answer to present the aforementioned clarification to the Commission.

### **I. MOTION FOR LEAVE TO FILE ANSWER**

The Commission's rules do not permit the filing of answers to protests. *See* 18 C.F.R. §385.213(a)(2). The Commission, however, has granted motions for leave to file such answers if they will clarify issues in dispute, ensure a complete and accurate record or otherwise provide information to assist the Commission in its decision-making process.<sup>4</sup> NERC's Answer will clarify the concerns raised in the TAPS Protest and will provide information that will assist the Commission in its decision-making process. The Commission should, therefore, permit NERC to submit this Answer.

### **II. ANSWER**

The TAPS Protest relates to Section 1500 of the NERC Rules of Procedure, "Confidential Information," which has been the subject of several NERC filings and Commission orders, including, as relevant to TAPS's Protest, the January 18, 2007 Order, 118 FERC ¶61,030 (2007) ("January 18 Order"), in which the Commission stated, with respect to NERC's then-current Section 1503.1 of its Rules of Procedure, "Certainly, no one should have to demonstrate a right to obtain information that is public, or that the submitting entity agrees may be disclosed to the

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<sup>4</sup>*San Diego Gas & Electric v. Sellers of Energy and Ancillary Services*, 108 FERC ¶61,219, at P14, n. 7 (2004) (answer was accepted as it "provided information that assisted [FERC in its] decision-making process"); *see also Michigan Electric Transmission Co.*, 106 FERC ¶61,064, at P 3 (2004) (the permitted answer "provides information that clarifies the issues"); *North American Electric Reliability Corporation, Order Certifying NERC as the Electric Reliability Organization and Ordering Compliance Filing*, 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 decisionmaking process"); *North American Electric Reliability Corporation, Order Conditionally Accepting 2007 Business Plan and Budget of the North American Electric Reliability Corporation, Approving Assessments to Fund Budgets and Ordering Compliance Filings*, 117 FERC ¶61,091, at P 18 (2006) (same); June 7 Order at P 6 (same).

requestor.”<sup>5</sup> On March 19, 2007, NERC made a compliance filing in Docket Nos. RR06-1-003 and RR06-1-005<sup>6</sup> in response to the January 18, 2007 Order, in which NERC submitted a proposed amendment to Section 1503.1 that specified that an entity requesting information demonstrate a need for, rather than a legal right to, the information.

The June 7 Order addressed NERC’s March 19 Compliance Filing. In that Order, the Commission stated:

65. In the *January 2007 Compliance Order*, we directed NERC to amend several provisions of section 1500 of its Rules of Procedure governing the confidentiality of information received by a “receiving entity” – the ERO or a Regional Entity. As applicable here, we required NERC to remove a provision from section 1503.1 that would have required a person who seeks information from NERC or a Regional Entity to show that it has a “demonstrable legal right” to obtain that information. . . .

66. In response, NERC deleted from section 1503.1 the requirement that a requestor show a demonstrable legal right to the information it seeks, and restated the sentence in question as, “A receiving entity shall make information available only to one with a demonstrated need for access to the information from the receiving entity . . . .

68. While NERC has complied with our directive to remove the requirement that one who requests reliability information relating to section 215 of the FPA from NERC or a Regional Entity show a demonstrable legal right to the information, NERC has substituted a requirement that the requestor demonstrate a need for access to the information. We are mindful that, in the *January 2007 Compliance Order*, the Commission stated that NERC and the Regional Entities are to “look with disfavor on frivolous, overly broad or unreasonable requests for information.” While NERC’s new “demonstrated need for access” requirement arguably comports with our statement, we remain concerned how NERC and the Regional Entities can differentiate the new requirement from the prior “demonstrable legal right to access” requirement. Nor has NERC indicated what showing it or a Regional Entity would require for the new requirement or how a

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<sup>5</sup>January 18 Order at P 193.

<sup>6</sup>Compliance Filing of the North American Electric Reliability Corporation in Response to January 18, 2007 Order and March 9, 2007 Order, Docket Nos. RR06-1-003 and RR06-1-005 (March 19, 2007) (the “March 19 Compliance Filing”).

requestor may meet it. Accordingly, we direct NERC to clarify these issues in its compliance filing.<sup>7</sup>

In its August 6 Compliance Filing, NERC responded as follows to the directive in paragraph 68 of the June 7 Order, without distinguishing, in this regard, how Section 1500 should apply to public information versus confidential information:

NERC has concluded that the clarification requested by the Commission in P 68 is best provided by including additional detail and clarification in the relevant provision of the NERC Rules of Procedure (Section 1503.2.2) which will thereby be available to all interested parties, rather than through a narrative discussion in this compliance filing. The revisions to Section 1503.2.2 are shown in **Attachment 1B** and are as follows:

- 2.2 The request must identify the individual or entity that will use the information, explain ~~include a statement of the requester's need for access to the information, explain how the requester and an explanation of how it will use the information in furtherance of that need, and state whether the information is publicly available or available from another source or through another means.~~ If the requester seeks access to information that is subject to a prohibition on public disclosure in the Commission-approved rules of a regional transmission organization or independent system operator or a similar prohibition in applicable federal, state, or provincial laws, the requester shall describe how it qualifies to receive such information.

Under the revised rule, the request must identify the individual or entity that will use the information sought, provide an explanation of the requester's need for that information and of how the information will be used in furtherance of that need, and state whether the information requested is publicly available or available from another source or through another means. NERC anticipates that its response to each request for disclosure of information that has been designated will depend on the particular facts and circumstances associated with the information and the request. However, the information and explanations provided, in accordance with Section 1503.2.2, in a request for disclosure, and the quality of those explanations, will enable NERC to make an informed determination in each case as to whether the requester's need for disclosure from NERC outweighs the interests of the entity originally supplying the information in protecting it from disclosure, as well as to evaluate whether the request for information is "frivolous, overly broad or unreasonable." Further, in accordance with the directive in

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<sup>7</sup>June 7 Order at PP 65, 66, 68 (footnotes omitted).

paragraph 193 of the January 18 Order on this point, NERC will not require any person or entity requesting disclosure of information to explain how the requester is legally entitled to the information.<sup>8</sup>

The TAPS Protest expressed several concerns with respect to NERC's response to paragraph 68 of the June 7 Order and to the revised text of Section 1503.2.2, in the context of requests for public information from NERC or a Regional Entity. Specifically, TAPS expressed concern that proposed Section 1503.2.2, coupled with NERC's explanation, indicated that NERC would be applying a "balancing test" to requests for public information, which TAPS stated would be inappropriate when applied to public information. TAPS also stated that this "balancing test" would, in the case of requests for public information, be inconsistent with the Commission's previous directive to remove the requirement that the requesting party demonstrate it has a "legal right" to obtain the requested information. Additionally, TAPS stated that the August 6 Compliance Filing did not contain a sufficient explanation of what a requesting party would need to show to meet the "demonstrable need" test. Finally, TAPS stated that NERC should clarify that a requestor's identification of who is going to use the requested public information and for what purposes is not binding on the requestor, *i.e.*, that public information is not provided subject to protective order-type controls on the use of the information and the person using it.<sup>9</sup>

NERC notes that the concerns expressed in the TAPS Protest focus on requests for public information, *i.e.*, requests for information that either was not designated as "confidential information" by the entity submitting the information to NERC or a Regional Entity, or information that was designated as "confidential information" by the submitting entity but is

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<sup>8</sup>August 6 Compliance Filing at 4-5.

<sup>9</sup>TAPS Protest at 4-5.

subsequently determined (by action or inaction of the submitting entity or through the procedures specified in Section 1503 of the Rules of Procedure) to not be “confidential information.”

As noted above, TAPS stated that although it was submitting a limited protest, it “would welcome the opportunity to work with NERC to develop an acceptable approach that is consistent with the Commission’s directives.”<sup>10</sup> Subsequent to the filing of the TAPS Protest, NERC and TAPS have conferred concerning an appropriate clarification to NERC’s response to paragraph 68 of the June 7 Order that would address the concerns expressed in the TAPS Protest. As a result of those discussions, NERC provides the following clarification with respect to revised Section 1503 of its Rules of Procedure as submitted in the August 6 Compliance Filing:

With respect to information requested from NERC or a Regional Entity under Section 1503 of the NERC Rules of Procedure which either (i) the submitting entity (as defined in Section 1502.1) has not marked as “confidential information”, (ii) the submitting entity, in response to the opportunity to comment pursuant to Section 1503.3, does not continue to claim to be “confidential information”, or (iii) the receiving entity (as defined in Section 1502.1), following notice and opportunity for comment pursuant to Section 1503.3, determines is not in fact “confidential information” as defined in Section 1501 (information falling into category (i), (ii) or (iii) being referred to herein as “public information”), then

1. NERC and the Regional Entities will not employ a “balancing test” with respect to requests for such information. The information provided by a requestor pursuant to Rule 1503.2.2 will be used to assess whether the request is not “frivolous, overly broad or unreasonable” and therefore should be granted.

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<sup>10</sup>*Id.* at 1.

2. Entities obtaining public information from NERC or a Regional Entity are not required to limit access to that information to the individuals listed in the request to NERC pursuant to Section 1503.2.2, nor to the purposes listed pursuant to that subsection.

NERC is authorized by TAPS to state that TAPS concurs in the foregoing clarification and that it resolves the concerns raised in the TAPS Protest.

### **III. CONCLUSION**

The North American Electric Reliability Corporation respectfully requests that the Commission (1) allow this Answer to the TAPS Protest, and (2) accept the clarification provided herein to NERC's response to paragraph 68 of the June 7 Order, in order to resolve the concerns expressed in the TAPS Protest.

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 Chicago, Illinois this 14 day of September, 2007.

/s/ Owen E. MacBride  
Owen E. MacBride

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