

Background

A. Regulatory History

2. Pursuant to section 215 of the Federal Power Act,¹ in July 2006, the Commission certified NERC as the Electric Reliability Organization (ERO).² In the *ERO Certification Order*, the Commission found NERC's compliance registry process to be a reasonable means "to ensure that the proper entities are registered and that each knows which Commission-approved Reliability Standard(s) are applicable to it."³ The Commission also approved NERC's Rules of Procedure, including section 500 (Organization Registration and Certification), subject to certain revisions. Section 501.3.4 of NERC's Rules of Procedure provides that an entity may "appeal" a NERC registration determination to the "applicable governmental authority."

3. Pursuant to the registration process, NERC, with the assistance of the Regional Entities, identifies users, owners, and operators of the Bulk-Power System that must comply with specific Commission-approved Reliability Standards based on the functional activities of the user, owner or operator. Further, NERC developed a Statement of Compliance Registry Criteria (Registry Criteria) that describes how NERC will identify organizations for registration, including guidelines for determining when an entity should be excluded. Most relevant to these proceedings, NERC defines an LSE as an entity that "secures energy and transmission service (and related interconnected operations services) to serve the electrical demand and energy requirements of its end-use customers."⁴ The NERC Compliance Registry Criteria provide that LSEs will be registered if "Load-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system"⁵

4. In Order No. 693, the Commission formally approved NERC's compliance registry process and the related Compliance Registry Criteria when it addressed NERC's

¹ 16 U.S.C. § 824o.

² See *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 (*ERO Certification Order*), order on reh'g and compliance, 117 FERC ¶ 61,126 (2006).

³ *Id.* at P 689.

⁴ NERC Compliance Registry Criteria, section II.

⁵ See *id.*, section III.a.1. The criteria also provide that a LSE with an underfrequency load shedding program or undervoltage load shedding program may be registered. NERC does not indicate that these criteria are applicable with regard to the three retail marketers at issue here.

initial submission of proposed Reliability Standards.⁶ The Commission explained that it would rely on the NERC registration process to identify the set of entities that are responsible for compliance with particular Reliability Standards.⁷

5. In April 2007, the Commission approved the delegation agreements between NERC and each of the eight Regional Entities, including ReliabilityFirst.⁸

B. NERC Determination

6. On August 21, 2007, NERC issued three written determinations finding that ReliabilityFirst properly registered Direct, Sempra and Strategic as LSEs. The basis for NERC's finding is the same for each of the three entities.

7. According to NERC, Direct, Sempra and Strategic are retail power marketers that sell energy to retail end-use customers within the ReliabilityFirst region. NERC refers to its registration criteria for LSEs and states that each of these retail marketers has a peak load that exceeds 25 MW. Further, while these retail power marketers are not directly connected to the Bulk-Power System, the load they serve is considered directly connected to the Bulk-Power System. NERC acknowledges that retail power marketers typically do not own transmission, distribution or generation assets, but NERC also states that Direct, Sempra and Strategic each performs LSE tasks, such as securing energy, transmission services and required reserves to serve the electrical demand and energy requirements of its end-use customers.

8. According to NERC, these retail power marketers have assumed the role of providing power in place of a "hosting entity," and their registration as LSEs is necessary to ensure that load data is reported as required by the Reliability Standards. Exclusion of these retail power marketers would result in "gaps and exclusions" in monitoring the applicable Reliability Standards.⁹ NERC adds that approximately 280 requirements of the Reliability Standards apply to LSEs and, while recognizing that many of those requirements may not be applicable to retail power marketers, NERC believes that they should be responsible for a subset of those requirements.

⁶ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 92-96, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁷ *Id.* at P 95.

⁸ *See North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on rehearing*, 120 FERC ¶ 61,260 (2007).

⁹ *E.g.*, NERC Registry Decision, August 21, 2007, Strategic Energy, LLC, at 3.

9. NERC's Compliance Registry Criteria also provide that a class of entities, each of which would be individually excluded, may be registered based on their aggregate impact on Bulk-Power System reliability.¹⁰ NERC states that, within ReliabilityFirst, the aggregate material impact and risk of the class of retail power marketers can be significant and therefore should be considered in the aggregate. In this regard, NERC explains that the ReliabilityFirst region includes several states with retail access and the aggregate MWs associated with this class of LSE can be significant.

Petitions for Commission Review

10. Direct, Sempra and Strategic seek Commission review of NERC's determinations that ReliabilityFirst properly registered them as LSEs. The retail power marketers contend that, while they are appropriately registered as purchasing-selling entities, the LSE designation does not make sense in the context of a marketer that does not own or operate any physical assets. They state that the NERC registry criteria for LSEs (peak load is > 25 MW and *directly connected* to the Bulk-Power System) contemplate the ownership or operation of physical assets. Further, NERC acknowledges that many of the requirements of the Reliability Standards that apply to LSEs are not pertinent to retail power marketers, yet NERC fails to specify which requirements apply to retail power marketers. According to Direct, Sempra and Strategic, such uncertainty unfairly exposes them to risk of non-compliance and possible penalties.

11. Direct, Sempra and Strategic also contend that NERC failed to provide adequate support for its conclusion that the loads of retail power marketers are directly connected to the Bulk-Power System. Likewise, they contend that NERC has not adequately supported its finding that the aggregate impact of retail power marketers in the ReliabilityFirst region is material to Bulk-Power System reliability. Direct, Sempra and Strategic also emphasize the inconsistency that results from their LSE registration in ReliabilityFirst, while other Regional Entities registered them as purchasing-selling entities and affirmatively declined to register them as LSEs. They contend that NERC does not provide an adequate justification for this unique treatment within ReliabilityFirst.

¹⁰ NERC Compliance Registry Criteria, at 9, provides that “[i]f an entity is part of a class of entities excluded based on the criteria above as individually being unlikely to have a material impact on the reliability of the bulk power system, but that in aggregate have been demonstrated to have such an impact[,] it may be registered for applicable standards and requirements irrespective of other considerations.”

Technical Conference and Interventions and Comments

12. In an order issued September 26, 2007, the Commission directed staff to conduct a technical conference to address common issues raised by the three appeals.¹¹ The Commission identified specific issues to be addressed in the technical conference, including: (1) the nature and extent of any gap in reliability that may result from a retail power marketer not being registered as an LSE; (2) the circumstances within the ReliabilityFirst region that justify the registration of retail power marketers as LSEs; (3) the identification of the Reliability Standards that would apply to a retail power marketer registered as an LSE; and (4) support for NERC's factual conclusions. Staff convened the technical conference on October 12, 2007. Representatives of NERC, ReliabilityFirst and each of the three retail marketers participated in the technical conference.

13. Notice of Direct's filing was published in the *Federal Register*, 72 Fed. Reg. 54,021 (2007), with interventions and protests due on or before October 11, 2007. Notice of Sempra's filing was published in the *Federal Register*, 72 Fed. Reg. 54,022 (2007), with interventions and protests due on or before October 11, 2007. Notice of Strategic's filing was published in the *Federal Register*, 72 Fed. Reg. 54,440 (2007), with interventions and protests due on or before October 11, 2007. An October 9, 2007 Notice of Technical Conference and Extension of Comment Date extended the deadline for interventions and protests in all three proceedings to October 29, 2007.

14. Appendix A identifies notices of intervention and motions to intervene in each of the proceedings. Below, we jointly discuss the comments because most commenters submitted the same comments in all three dockets and because of the common nature of the issues.

ReliabilityFirst, NERC and other Commenters Supporting Registration

15. ReliabilityFirst states that excluding retail power marketers from the compliance registry would create a gap in coverage of the Reliability Standards. It explains that, under the Reliability Standards, LSEs play an important role in compiling and disseminating information about their loads to other entities so that those entities have an accurate picture of the transmission system and can perform their own functions. ReliabilityFirst states that, while retail power marketers may not be able to comply with all of the Reliability Standards applicable to LSEs, there is a subset of standards with which retail marketers registered as LSEs can and should comply.¹² According to

¹¹ *Direct Energy Services, LLC*, 120 FERC ¶ 61,280 (2007) (*Direct Energy*).

¹² ReliabilityFirst identifies the following eleven Reliability Standards with which it expects retail marketers registered as LSEs to comply: IRO-001-1 (Reliability Coordination – Responsibilities and Authorities); IRO-004-1 (Reliability Coordination – Operations Planning); CIP-001-1 (Sabotage Reporting); BAL-005-0 (Automatic

ReliabilityFirst, retail marketers that do not own or operate physical assets are capable of complying with the LSE-related requirements of these Reliability Standards.

16. ReliabilityFirst disagrees with the appellants' claim that other entities, such as balancing authorities or host utilities, could more easily comply with the identified Reliability Standards than retail marketers. According to ReliabilityFirst, these entities are not currently obligated to assume responsibility for the appellants. It also notes that NERC's registration procedures allow entities to enter into agreements that delegate responsibilities to others but appellants have chosen not to do so.

17. ReliabilityFirst contends that the retail marketers are properly registered as LSEs pursuant to NERC's Registry Criteria. It explains that the retail marketers clearly meet the NERC definition of LSE because they "secure energy and transmission service (and related interconnection operations services) to serve the electrical demand and energy requirements of its end-use customers."¹³ Moreover, according to ReliabilityFirst, the retail marketers satisfy the registry threshold III.a.1, "[l]oad-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system." It states that each of the retail marketers registered as an LSE has a peak load greater than 25 MW. ReliabilityFirst contends that their load is directly connected to the Bulk-Power System, explaining that it would be "difficult" to serve peak load that is not directly connected. It further explains that a retail marketer, unlike a traditional distribution provider, serves peak load that is more geographically dispersed. According to ReliabilityFirst, this geographic disbursement of customers further confirms that the combined peak load of all of a retail marketer's customers is served through the Bulk-Power System, regardless of whether the retail marketer owns physical assets.

18. ReliabilityFirst argues that the appellants err when they interpret the NERC registry threshold as requiring that the LSE must be directly connected to the Bulk-Power System, as opposed to ReliabilityFirst's understanding that the peak load must be directly connected. It claims that, under the appellants' interpretation, the assets owned by an entity are the determining factor for LSE registration, not the functions performed by the entity. However, according to ReliabilityFirst, the purpose of the Registry Criteria is to identify entities that are responsible for compliance with the Reliability Standards based

Generation Control); EOP-002-2 (Capacity and Energy Emergencies); EOP-004-1 (Disturbance Reporting); MOD-017-0 (Aggregated Actual and Forecast Demands and Net Energy for Load); MOD-018-0 (Reports of Actual and Forecast Demand Data); MOD-019-0 (Reporting of Interruptible Demands and Direct Control Load Management); MOD-020-0 (Providing Interruptible Demands and DCLM Data); and MOD-021-0 (Accounting Methodology for Effects of Controllable DSM in Forecasts).

¹³ ReliabilityFirst comments at 12, quoting NERC Registry Criteria at 4-5.

on the functions they perform, not the assets they own. Further, it argues that the appellants' interpretation would create a gap in coverage of the Reliability Standards.

19. ReliabilityFirst also contends that, in the aggregate, retail marketers serving more than 25 MW of peak load have a material impact on reliability and should be registered on that basis. It states that the total load served by retail marketers in the ReliabilityFirst region is "significant" because many states within the region have moved to retail access. Thus, excluding retail marketers from the registry as LSEs "could create a gap in the information available for these loads served by the bulk electric system in the [ReliabilityFirst] region."¹⁴ Finally, with regard to concerns about inconsistency across regions, ReliabilityFirst states that it "has been informed by NERC that it will ensure that retail power marketers that function as LSEs will be registered as LSEs where appropriate, even if they have not yet been registered as such."¹⁵

20. NERC states that it supports ReliabilityFirst's comments. In addition, NERC agrees that not all of the Reliability Standards apply in the case of an LSE that does not own assets, and states that the same may be true for other registered entities that serve other functions. NERC indicates that it and the Regional Entities are prepared to work with registered entities to determine a list of applicable Reliability Standards. NERC notes that, subsequent to the technical conference, NERC and ReliabilityFirst have identified approximately eleven Reliability Standards that apply to LSEs that do not own assets. It states that the eleven Reliability Standards are not performed by others with respect to the specific loads at issue and compliance does not require ownership of assets. Because no other entity is responsible for compliance with these Reliability Standards with respect to the retail power marketers' retail load, there is no redundancy in coverage and registration of the appellants assures that no gap in coverage occurs.

21. Consumers Energy, Duke Energy, Exelon, Wisconsin Electric, FirstEnergy, Detroit Edison and Michigan Commission filed comments that support the registration of appellant retail marketers as LSEs and reiterate many of the positions of ReliabilityFirst and NERC. While recognizing that the retail marketers registered as LSEs cannot comply with many requirements of the relevant Reliability Standards, these commenters contend that retail marketers should be responsible for those with which they are capable of complying. Exelon emphasizes that entities should be registered based on their functional definition, and the retail marketers meet the NERC definition of LSE.

22. Many of these commenters state that the retail marketers, in their role as LSEs, have a legitimate role in maintaining the reliability of the Bulk-Power System.¹⁶ They

¹⁴ ReliabilityFirst comments at 15.

¹⁵ *Id.* at 11.

¹⁶ *See, e.g.*, Michigan Commission, Exelon, FirstEnergy, Wisconsin Electric and

comment that a blanket exemption from the LSE designation for retail marketers would create a reliability gap. For example, retail marketers should be required to provide information concerning their load. According to Michigan Commission, as retail marketers serve more load, the ability of traditional utilities to forecast such load may change and retail marketers will need to assume responsibility for load forecasting. These commenters also object to the retail marketers' suggestion that other entities such as distribution companies and regional transmission organizations (RTOs) are better able to fulfill the requirements that ReliabilityFirst would require of retail marketers. Commenters contend that the appellants serve the load and should not shift their responsibility to others.

23. Further, Duke Energy explains that ReliabilityFirst has developed a regional Reliability Standard, applicable to LSEs, that establishes requirements for resource adequacy. Duke Energy and other commenters believe that retail marketers should be registered as LSEs so they will be obligated to comply with resource adequacy requirements for their retail loads.¹⁷ Consumers Energy explains that the utility should not bear the responsibility or the cost of securing and maintaining reserves for load that it does not serve.

Appellant Retail Marketers and Other Commenters Opposing Registration

24. The three appellants, Direct, Strategic and Sempra, as well as ConEd Solutions (collectively, Indicated Retail Power Marketers), submitted joint comments opposing ReliabilityFirst's registration of retail marketers as LSEs. They contend that retail marketers do not satisfy the NERC Registry Criteria for LSEs, i.e., "[l]oad-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system" Specifically, they contend that none of the appellant retail marketers is directly connected to the Bulk-Power System since they do not own or operate physical assets. They argue that the applicable test is not whether the load is connected to the Bulk-Power System, as ReliabilityFirst contends. Moreover, according to the Indicated Retail Power Marketers, even under this understanding, ReliabilityFirst and NERC have not shown that the load served by the appellants is directly connected to the Bulk-Power System. They claim that many retail customers are served at voltages below 100 kV. To the extent that ReliabilityFirst and NERC contend that all load is connected to the Bulk-Power System, such a position would render meaningless the second clause of the Registry Criteria at issue (" . . . and is directly connected to the bulk power (>100 kV) system . . . ").

Consumers Energy.

¹⁷ See also Michigan Commission, Detroit Edison and Consumers Energy.

25. Indicated Retail Power Marketers also argue that ReliabilityFirst and NERC have not shown that retail power marketers have an aggregate reliability impact that warrants being registered as LSEs. They contend that other entities, such as distribution providers, balancing authorities and electric distribution companies that are registered as LSEs, are the appropriate entities to supply the information that ReliabilityFirst seeks from the retail marketers. According to Indicated Retail Power Marketers, these entities are in a better position to provide the data to ReliabilityFirst and have better access to reliable data.

26. Indicated Retail Power Marketers argue that ReliabilityFirst's registration of retail marketers as LSEs has resulted in inconsistency among the Regional Entities. For example, in October 2007, Texas Regional Entity registered Strategic Energy only as a purchasing-selling entity under the NERC Registry Criteria.

27. Indicated Retail Power Marketers claim that no reliability benefit is associated with imposing the LSE-related Reliability Standards on retail power marketers. They contend that they already are responsible to comply with some of the eleven Reliability Standards identified by ReliabilityFirst in their role as purchasing-selling entities. They also claim that one of the eleven Reliability Standards identified by ReliabilityFirst, EOP-002-2, does not apply to LSEs. According to Indicated Retail Power Marketers, some LSE Reliability Standards make no sense in the context of retail marketers. For example, they point to Reliability Standard BAL-005-0, contending that retail marketers neither maintain nor have control over metered boundaries. Other Reliability Standards that require the provision of information, such as historical load data and forecasted demand, if imposed on retail marketers, would result in duplicative data, since other entities already provide such data. Further, they represent that, regardless of NERC's and ReliabilityFirst's registration decision, retail power marketers will remain subject to all reserve requirements imposed on power suppliers by the RTOs in which they make sales.

28. Dominion Retail, PPL Companies, Integrys, Reliant, TAPS, and BlueStar support the appellants and urge the Commission to reverse the registry determinations. Reliant, TAPS and Integrys contend that ReliabilityFirst's decision is contrary to NERC's Registry Criteria, and state that the correct understanding is that the LSE, not the load, must be directly connected to the Bulk-Power System. Further, they contend that ReliabilityFirst has provided no analysis or support for its conclusion that retail marketers, in the aggregate, have a material impact on reliability. Integrys comments that a retail marketer, unlike a traditional "distribution LSE," does not own or operate distribution systems and, thus, has virtually no ability to materially affect reliability.

29. Dominion Retail and BlueStar, both retail marketers, point out inconsistencies among Regional Entities in registering retail marketers. BlueStar comments that SERC has registered it only as a purchasing-selling entity, while ReliabilityFirst has registered it as a purchasing-selling entity and an LSE. Dominion Retail states that it was initially registered as both a purchasing-selling entity and an LSE by Northeast Power Coordinating Council, Inc. (NPCC), but recently has been advised that NPCC is de-

registering Dominion Retail as an LSE. Similarly, ConEd states that NPCC has registered ConEd's power marketer subsidiaries only as purchasing-selling entities.

30. PPL Companies comment that retail marketers, for the most part, cannot comply with the LSE-related Reliability Standards identified by ReliabilityFirst. PPL Companies states that it does not object to requiring retail marketers that are appropriately registered to provide actual or historical load data needed for reliability. However, it questions the benefits of retail marketers providing future load forecasts since they serve retail load pursuant to a contract, and cannot reasonably project load beyond the contract term.

31. Reliant and Integrys support alternative solutions to registering retail marketers as LSEs, such as having NERC define "retail competitive marketer" as a new function and designing new Reliability Standards to address the responsibilities of that function.

Other Comments

32. AMP-Ohio states that its members have an interest in ensuring that the Registry Criteria are interpreted as written. It expresses concern that the ReliabilityFirst and NERC decisions to register retail marketers as LSEs portend that the NERC Registry Criteria will be subject to expansive interpretation in the future. AMP-Ohio states that it is troubled that ReliabilityFirst and NERC did not appear to have analyzed, prior to the technical conference, whether Bulk-Power System reliability actually would be jeopardized unless retail marketers are registered as LSEs. It urges that interpretations of the Registry Criteria reflect an appropriate balance between practicality and improved reliability, and NERC and the Regional Entities should not be permitted to adopt variations on the Registry Criteria without Commission approval.

33. TANC comments that the NERC Functional Model does not sufficiently capture the business structure and organization of all entities and is concerned that the Functional Model does not provide NERC any flexibility regarding how to register entities that do not have a matching business structure. TANC states that it is necessary to add to the Applicability section of Reliability Standards limitations on applicability based on electric facility characteristics.

Discussion

A. Procedural Matters

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁸ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

¹⁸ 18 C.F.R. § 385.214 (2007).

B. Commission Determination

35. The Commission grants the appeals of the retail marketers and reverses NERC's registry determinations at issue.¹⁹ As discussed below, the Commission concludes that NERC's determinations (1) are not supported by the record or NERC's Registry Criteria, (2) result in inconsistent application of the Registry Criteria among the Regional Entities, and (3) do not adequately identify the Reliability Standards for which retail marketers registered as LSEs would be responsible.

Registry Criteria

36. NERC defines "LSE" as an entity that "secures energy and transmission service (and related interconnected operating services) to serve the electrical demand and energy requirements of its end use customers."²⁰ This definition appears to be broad enough to include power marketers that serve retail customers. However, NERC's Registry Criteria provide that an LSE "should be excluded from the registration list" for that function if it does not meet the specific LSE registration criteria: "[l]oad-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system"²¹ The Commission understands this threshold as referring to an LSE that has two qualities: (1) it has a peak load greater than 25 MW and (2) it is directly connected to the Bulk-Power System.²² Based on this understanding, the three appellants do not satisfy the threshold

¹⁹ In addition to registering Direct, Sempra and Strategic as LSEs, ReliabilityFirst has registered them as purchasing-selling entities, which NERC defines as "the entity that purchases or sells and takes title to energy, capacity, and interconnected operations services." NERC Registry Criteria at 5. As noted above, Direct, Sempra and Strategic assent to their registration as purchasing-selling entities. Accordingly, our determination does not affect the registration of the appellants as purchasing-selling entities. Moreover, based on the pleadings, it appears that Regional Entities are consistently registering retail marketers as purchasing-selling entities. The Commission believes that the registration of retail marketers as purchasing-selling entities is appropriate.

²⁰ *See* NERC, Glossary of Terms Used in Reliability Standards at 10 (May 2007); NERC Compliance Registry Criteria, section II.

²¹ NERC Compliance Registry Criteria, sections III and III.a.1.

²² In Order No. 693, at P 93, the Commission described the Registry Criteria, stating that NERC plans to register only those LSEs "that have a peak load of 25 MW or greater and are directly connected to the Bulk-Power System." While this description was not determinative of any Commission conclusion, NERC did not seek to correct the Commission's understanding of the LSE registry criteria.

because they do not own or operate physical assets that are directly connected to the Bulk-Power System.

37. NERC's and ReliabilityFirst's alternative understanding of the Registry Criteria threshold, i.e., that it refers to peak load and "load served by [the three retail marketers] is considered directly connected to the Bulk-Power System, as is all customer load,"²³ is untenable. Consistent with their expansive understanding, every retail load is directly connected to the Bulk-Power System. While it may be true that every retail load is, ultimately, connected to the Bulk-Power System, the Registry Criteria require a "direct connection."²⁴ Moreover, we agree with the appellants that NERC's and ReliabilityFirst's position would render meaningless the latter phrase of the LSE threshold since it would encompass all retail load. It also appears that such an understanding is inconsistent with NERC's registry decisions in other contexts. For example, in registering generator owners and operators, NERC applies the phrase "directly connected to the Bulk-Power System" to generators connected to a transmission line with voltage of 100 kV or above.²⁵ The owner or operator of a generating unit connected at a voltage of less than 100 kV would not be registered unless justified pursuant to another provision of the Registry Criteria.²⁶

38. ReliabilityFirst contends that the geographic disbursement of the retail marketers' customers confirms that their peak load is served through the Bulk-Power System. The Registry Criteria, however, do not speak in terms of load being "served through" the Bulk-Power System but, rather, requires a "direct connection" to the Bulk-Power System.

²³ See, NERC Decision on appeal of Strategic, at 2; *see also* ReliabilityFirst comments at 13 ("[i]t would be difficult for any market participant to serve retail load who does not own any physical assets to argue that they are able to serve a peak load that is not directly connected to the bulk power system").

²⁴ Moreover, NERC and ReliabilityFirst do not provide any factual support that the load served by Direct, Sempra and Strategic are directly connected to the Bulk-Power System.

²⁵ See NERC Registry Criteria, Section III(c).1 ("individual generating units > 20 MVA (gross nameplate rating) and is *directly connected* to the bulk power system. . . .").

²⁶ See, e.g., NERC Registry Decision, Lee County, Florida, *et al.*, at 2 (August 21, 2007) (generator connected to the Bulk Power System at 138 kV "clearly meets the threshold criteria"). *Cf.*, NERC Registry Decision, Pasco County, Florida and Pasco County Resource Recovery Facility, at 2 (July 5, 2007) ("generating facilities in the FRCC footprint that are connected below 100 kV were evaluated based on material impact" to the Bulk-Power System").

39. ReliabilityFirst also claims that the LSE threshold refers to peak load, as opposed to an entity, that is directly connected to the Bulk-Power System because the Registry Criteria identify whether an entity should be registered based on the function the entity performs, not the assets it owns. A review of other thresholds set forth in the Registry Criteria, however, does not support ReliabilityFirst's position. For example, the Registry Criteria identifies "generator owner" and "generator operator" as functional categories, yet applies a threshold based on the size of the assets owned or operated (e.g., "individual generating unit > 20 MVA (gross nameplate rating) and is directly connected to the bulk power system"). Likewise, the threshold for registering an entity in the functional category of "transmission owner" may depend on whether it owns "an integrated transmission element associated with the bulk power system 100 kV and above. . . ."

40. Finally, neither NERC nor ReliabilityFirst has provided anything more than conclusory statements to support the claim that retail marketers with more than 25 MW peak load, in the aggregate, have a material impact on Bulk-Power System reliability. ReliabilityFirst states that there is significant retail competition in the ReliabilityFirst region. It also suggests that the fact that there will be a reliability gap if retail marketers are not registered as LSEs is sufficient proof that they have a material impact on reliability. The Commission finds that such statements, without further support or explanation, are not an adequate demonstration that retail marketers, in the aggregate, have a material impact on reliability.

Inconsistency in Registration of Retail Marketers Among Regional Entities

41. The appellants and several commenters represent that other Regional Entities considered whether to register retail marketers as LSEs and declined to do so. Neither NERC nor ReliabilityFirst refute these representations. Nor do they articulate any rationale why it is appropriate to treat retail marketers in ReliabilityFirst differently than retail marketers in other regions.

42. ReliabilityFirst suggests that NERC will "ensure that retail power marketers that function as LSEs will be registered as LSEs where appropriate. . . ." ²⁷ NERC, however, is silent on the matter. ReliabilityFirst's representation does not provide the Commission with adequate assurance that NERC is developing a plan for consistently addressing the treatment of retail marketers across the regions. Moreover, according to commenters, Regional Entities other than ReliabilityFirst have either declined to register retail marketers as LSEs or, in the case of NPCC, reversed an earlier registry decision on the matter, as recently as October 2007.

²⁷ ReliabilityFirst comments at 11.

43. The Commission believes that the registration process should provide consistency across the regions, unless a persuasive reason is articulated for such differences. This does not appear to be the case with regard to the registration of retail marketers as LSEs.

Reliability Standard Compliance

44. As discussed above, NERC and ReliabilityFirst acknowledge that retail marketers that do not own physical assets are not capable of complying with all of the Reliability Standards that apply to LSEs. While NERC's registry decisions identified certain Requirements of the Reliability Standards with which NERC expected retail marketers to comply, it appeared that this list was not complete. Thus, the Commission, in establishing a technical conference, sought the identification of the Reliability Standard requirements that would apply to a retail power marketer registered as an LSE.²⁸

45. ReliabilityFirst, in its comments following the technical conference, identifies 11 Reliability Standards with which it expects retail marketers registered as LSEs to comply. According to ReliabilityFirst and NERC, retail marketers that do not own or operate physical assets are capable of complying with these Reliability Standards.

46. The Commission believes that, while an improvement, the identification of the 11 Reliability Standards does not fully resolve the matter. For example, ReliabilityFirst expects retail marketers registered as LSEs to comply with Reliability Standard EOP-002-2. Yet, this Reliability Standard does not identify LSEs as an applicable entity. Likewise, ReliabilityFirst identifies another Reliability Standard, IRO-001-1, with which the retail marketers are currently required to comply in their role as purchasing-selling entities. ReliabilityFirst identifies other Reliability Standards applicable to LSEs, mostly pertaining to the provision of historical or forecast load data, which it believes retail marketers must comply with to assure that there is not gap in reliability. The retail marketers, on the other hand, claim that either they are not capable of compliance or their compliance would result in redundancies since other entities such as RTOs and balancing authorities already provide the data.

47. The Commission will not decide in this proceeding which Reliability Standards should apply to retail marketers.²⁹ However, based on the record in this proceeding, we

²⁸ *Direct Energy*, 120 FERC ¶ 61,280 at P 13.

²⁹ Several commenters raise concerns that retail marketers should be registered as LSEs so they will be obligated to comply with ReliabilityFirst's recently-developed regional Reliability Standard regarding resource adequacy. This regional Reliability Standard has not been submitted to the Commission for approval as mandatory and enforceable and, as such, is not an appropriate subject for consideration in our determination in the immediate proceedings.

are not persuaded that NERC and ReliabilityFirst have identified a comprehensive set of Reliability Standards with which retail marketers, if registered as LSEs, could reasonably be expected to comply.

48. Accordingly, for the reasons set forth above, the Commission grants the appeal of Direct, Sempra and Strategic, and reverses NERC's registration determinations.

Reliability Gap

49. Both NERC and ReliabilityFirst assert that there will be a "reliability gap" if retail marketers are not registered as LSEs. Although NERC's and ReliabilityFirst's approach to registering retail marketers as LSEs is reversed, the Commission is concerned about the reliability gap that NERC and ReliabilityFirst claim will occur. NERC's Functional Model was developed to assign the reliability functions that historically were performed by vertically integrated utilities to specific entities so that there would not be a gap or undue overlap in the responsibilities to provide for reliable operation. If retail marketers are not registered as LSEs, it still may be the case that they possess information relevant to the reliable operation of the Bulk-Power System that is not provided by other users, owners or operators.

50. To avoid a possible gap, NERC must develop a consistent, uniform approach to ensure that appropriate Reliability Standards and Requirements are applied to retail marketers. While the appellants have suggested several approaches, such as developing a new functional category in the NERC Functional Model and revising the appropriate Reliability Standards, we leave to NERC's discretion to propose an appropriate approach. To assure that the matter is addressed in a timely manner, we direct NERC to submit a plan, within 75 days of the date of this order, describing how it will address this issue.

The Commission orders:

(A) The appeal of Direct Energy Services, LLC is hereby granted, as discussed in the body of this order.

(B) The appeal of Sempra Energy Solutions LLC is hereby granted, as discussed in the body of this order.

(C) The appeal of Strategic Energy, L.L.C. is hereby granted, as discussed in the body of this order.

(D) The North American Electric Reliability Corporation is hereby directed to file a plan describing how it will address the “reliability gap,” within 75 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A

Interventions³⁰

Ameren Services Company
AMP-Ohio, Inc. (AMP-Ohio)
Baltimore Gas and Electric Company
BlueStar Energy Services, Inc. (BlueStar)
Consolidated Edison Energy, Inc. and Consolidated Edison Solutions, Inc. (ConEd)
Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.
Consumers Energy Company (Consumers Energy)
Detroit Edison Company and DTE Energy Trading, Inc. (Detroit Edison)
Dominion Retail, Inc. (Dominion) [Docket No. RC07-7-000]
Duke Energy Corporation (Duke)
Electric Power Supply Association
Exelon Corporation (Exelon)
FirstEnergy Service Company (FirstEnergy)
Integrus Energy Services, Inc. (Integrus)
Michigan Public Service Commission (Michigan Commission)*
North American Electric Reliability Corporation (NERC)
Organization of MISO States*
PPL Electric Utilities Corp. and PPL EnergyPlus LLC (PPL Companies)
Public Utilities Commission of Ohio*
ReliabilityFirst Corporation (ReliabilityFirst)
Reliant Energy, Inc. (Reliant)
Sempra Energy Solutions LLC (Sempra) [Docket Nos. RC07-4-000 and RC07-7-000]
Strategic Energy L.L.C. (Strategic) [Docket Nos. RC07-4-000 and RC07-6-000]
Suez Energy Resources NA, Inc.
Transmission Access Policy Study Group (TAPS)
Transmission Agency of Northern California (TANC)
Wisconsin Electric Power Company (Wisconsin Electric)
Wisconsin Public Service Commission*

* Notice of Intervention

³⁰ Parties intervened in all three dockets unless otherwise noted.