

125 FERC ¶ 61,205  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Constellation Energy Commodities Group, Inc.                      Docket No. RC08-7-000

ORDER REMANDING COMPLIANCE REGISTRY DETERMINATION TO THE  
ELECTRIC RELIABILITY ORGANIZATION

(Issued November 20, 2008)

1. In this order, the Commission remands to the North American Electric Reliability Corporation (NERC) a decision in which NERC found that the Texas Regional Entity,<sup>1</sup> a Commission-approved Regional Entity, properly included Constellation Energy Commodities Group, Inc. (Constellation) on the NERC compliance registry as a generator operator, concurrently with Power Resources Ltd. (Power Resources). Constellation appealed the registry decision to the Commission, arguing that it was improperly registered as a generator operator because it neither owns nor operates the generation facility at issue in this proceeding. As discussed below, the Commission remands the matter to NERC for further consideration and directs NERC to supplement the record in this proceeding with additional information within 60 days of the date of this order.

**I. Background**

**A. NERC's Compliance Program**

2. In July 2006, the Commission certified NERC as the Electric Reliability Organization (ERO) pursuant to section 215 of the Federal Power Act (FPA).<sup>2</sup> Subsequently, in April 2007, the Commission approved delegation agreements between NERC and eight Regional Entities, including a delegation agreement between NERC and

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<sup>1</sup> Texas Regional Entity is an independent division of the Electric Reliability Council of Texas, Inc. (ERCOT ISO).

<sup>2</sup> *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007); 16 U.S.C. § 824o (2006).

Texas Regional Entity.<sup>3</sup> In that delegation agreement, NERC provided Texas Regional Entity with the authority to enforce mandatory Reliability Standards within its territory and add entities to the compliance registry.

3. In Order No. 693, the Commission approved 83 Reliability Standards, which became effective on June 18, 2007.<sup>4</sup> Further, in Order No. 693, the Commission approved NERC's compliance registry process, including NERC's Statement of Compliance Registry Criteria (Registry Criteria), which describes how NERC and the Regional Entities will identify entities that should be registered for compliance with mandatory Reliability Standards.<sup>5</sup> NERC's Rules of Procedure provide that an entity registered by a Regional Entity may seek NERC review of the registration decision and, ultimately, may appeal the registration decision to the Commission.

**B. NERC Registry Criteria**

4. NERC defines the bulk-electric system as:

[T]he electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition.<sup>6</sup>

5. Section I of NERC's Registry Criteria provides that an entity that uses, owns or operates elements of the bulk electric system pursuant to NERC's definition above is a candidate for registration. Section II of the Registry Criteria categorizes registration candidates under various functional entity types including generator operator, defining the term as "[t]he entity that operates generating unit(s) and performs the functions of supplying energy and interconnected operations services." Section III of NERC's Registry

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<sup>3</sup> *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, at P 316, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

<sup>4</sup> *Mandatory Reliability Standards for the Bulk Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

<sup>5</sup> Order No. 693 at P 92-95. NERC's amended Registry Criteria were approved by the Commission in *North American Electric Reliability Corp.*, 122 FERC ¶ 61,101 (2008).

<sup>6</sup> Order No. 693 at P 51; NERC Glossary of Terms Used in Reliability Standards, May 2007; NERC Registry Criteria, section I.

Criteria identifies certain thresholds for registering entities that satisfy the criteria of sections I and II. For example, the Registry Criteria provide for the registration of a generator operator of an individual generating unit greater than 20 MVA (gross nameplate rating) and directly connected to the Bulk-Power System. None of the parties argue that any of the exclusions listed in section III are applicable in this proceeding.

### **C. Power Resources Generation Facility and Tolling Agreement**

6. Power Resources owns a 212 MW, gas-fired, combined cycle electrical generation facility located in Howard County, Texas. On January 11, 2007, Power Resources and Constellation executed a Tolling Agreement that governs Power Resources' sales and Constellation's purchases of electric generation capacity, thermal energy and electric energy, including all ancillary products and services marketable in the ERCOT ISO transmission area from the generation facility.<sup>7</sup> Under the Tolling Agreement, Constellation agreed to be the Qualified Scheduling Entity for the facility. As the Qualified Scheduling Entity, Constellation communicates the facility's schedule to ERCOT ISO.

7. Power Resources and Constellation have each signed a Standard Form Market Participant Agreement (Market Participant Agreement) with ERCOT ISO. In the Market Participant Agreement, Constellation registered with ERCOT ISO as a "Level 4" Qualified Scheduling Entity. Power Resources registered with ERCOT ISO as a Resource Entity.

### **D. Qualified Scheduling Entity in ERCOT ISO**

8. In the ERCOT ISO market, a Qualified Scheduling Entity is a market participant registered to submit balanced schedules, provide ancillary services bids and settle payments with ERCOT ISO. An Entity that seeks to participate in the ERCOT ISO wholesale market must register as a Qualified Scheduling Entity or establish a relationship with a Qualified Scheduling Entity to provide the above services. Pursuant to its protocols, ERCOT ISO will not communicate directly with a generation owner; all communications must flow through a Qualified Scheduling Entity. All financial settlements for the ERCOT ISO wholesale market are transacted between ERCOT ISO and a Qualified Scheduling Entity only. ERCOT ISO only accepts schedules and bids from Qualified Scheduling Entities.

9. Qualified Scheduling Entities are classified into four service levels. Classification is determined based on the services an entity provides, as follows: (1) Level 1, qualified

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<sup>7</sup> Constellation Appeal at 2-3. The Tolling Agreement is included as Exhibit M to Constellation's Appeal and identified as confidential information.

to perform Inter-Qualified Scheduling Entity trades only; does not have direct representation of load serving entities (LSEs) or Resource Entities; (2) Level 2, qualified to represent LSEs; does not have direct representation of Resource Entities; may also perform level 1 activity; (3) Level 3, qualified to represent LSEs and/or Resource Entities without providing ancillary services; may also perform level 1 and 2 activities; and (4) Level 4, qualified to represent LSEs and/or Resource Entities and provide ancillary services; may also perform level 1, 2 and 3 activities. A Qualified Scheduling Entity which qualifies as a provider of ancillary services can only participate in the ERCOT ISO markets as a Level 4 Qualified Scheduling Entity.

10. A Qualified Scheduling Entity representing a generation owner must provide real-time data to ERCOT ISO for each individual generating unit. If a Qualified Scheduling Entity provides responsive reserve and/or regulation services, or any other ancillary services, it must obtain communications equipment to receive ERCOT ISO telemetered control deployments of service power. In return, ERCOT ISO makes this information received from the Qualified Scheduling Entity available to the generation owner.

## **II. Appeal of NERC Registry Decision**

### **A. NERC Registry Decision**

11. Although Texas Regional Entity initially registered Constellation as the sole generator operator, upon appeal, NERC directed Texas Regional Entity to pursue a voluntary, joint registration of Power Resources and Constellation.<sup>8</sup> On January 8, 2008, Texas Regional Entity issued a finding that both Constellation and Power Resources perform certain generator activities that pertain to mandatory Reliability Standards. Because the parties could not agree on a joint registration agreement, Texas Regional Entity registered both Constellation and Power Resources concurrently as generator operator for the Power Resources facility. Both Power Resources and Constellation objected to this decision and sought NERC review.

12. NERC consolidated the two appeals and subsequently rejected both, finding that both Constellation and Power Resources should be registered as generator operator.<sup>9</sup> Noting that the Tolling Agreement was executed after the enactment of the Energy Policy

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<sup>8</sup> NERC's Rules of Procedure (sections 501 and 507) and Registry Criteria (section IV) provide that entities may determine by written contract which entity is responsible for compliance with Reliability Standards.

<sup>9</sup> Power Resources did not appeal the NERC decision.

Act of 2005<sup>10</sup> and NERC's certification as the ERO, but prior to the Commission's approval of mandatory Reliability Standards, NERC rejected arguments by both Constellation and Power Resources "that it could not be foreseen that the Tolling Agreement should address each entity's compliance responsibilities with respect to NERC's imminent mandatory and enforceable Reliability Standards. . . . To the contrary . . . [NERC] finds . . . the Tolling Agreement does address the parties' respective obligations."<sup>11</sup>

13. NERC stated that, pursuant to ERCOT ISO's unique framework, a Resource Entity such as Power Resources must contract with a Qualified Scheduling Entity such as Constellation to engage in communications with the ERCOT ISO, except in certain emergency conditions. NERC explained that Constellation voluntarily assumed the obligation to perform certain communications services and other activities for Power Resources. Further, according to NERC, Constellation did not dispute that certain of these communications services overlap or closely track certain requirements of Reliability Standards applicable to generator operators.<sup>12</sup> NERC explained that, while Power Resources physically operates the generation facility, "it does so pursuant to directives of [Constellation]."<sup>13</sup> Thus, NERC found that both Power Resources and Constellation assumed obligations that require each of them to comply with Reliability Standards applicable to generator operators; and affirmed Texas Regional Entity's decision to concurrently register both entities as generator operators.

#### **B. Constellation's Appeal to the Commission**

14. In its appeal, Constellation argues that NERC's findings and conclusions are largely conclusory and lack any underlying foundation. Constellation claims that it did not agree, in either the Tolling Agreement or Market Participant Agreement, to accept responsibility for any generator operator requirements. Constellation contends that its agreement to act as the Qualified Scheduling Entity for the Power Resources facility does not equate to an agreement that Constellation will serve as the generator operator for purposes of compliance with mandatory Reliability Standards. Constellation claims that

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<sup>10</sup> Energy Policy Act of 2005 (EPAAct 2005), Pub. L. No. 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005).

<sup>11</sup> NERC Registry Decision at 16.

<sup>12</sup> NERC Registry Decision at 11. NERC does not identify the specific Reliability Standards applicable to generator operators that track Qualified Scheduling Entity responsibilities.

<sup>13</sup> *Id.*

the provisions of the Tolling Agreement are narrowly drawn and clearly limit Constellation's Qualified Scheduling Entity obligations to the requirements found in the ERCOT ISO protocols. According to Constellation, the Tolling Agreement clearly states that Power Resources is responsible for complying with reliability requirements. Constellation asserts that Power Resources, as the generator operator, is free to contract with a third party to serve as a communications interface for purposes of NERC Reliability Standards. "Such a contractual relationship may result in Constellation performing *tasks* related to communications, but not bearing any responsibility under the [generator operator] Requirements" of Reliability Standards.<sup>14</sup>

15. Constellation asserts that Texas Regional Entity and NERC have improperly merged the Qualified Scheduling Entity and generator operator functions, as Constellation is only an intermediary in its Qualified Scheduling Entity communications with ERCOT ISO, but does not have the ability to ensure that Reliability Standards applicable to generator operators are met. According to Constellation, only Power Resources can create the required information, initiate communications and act upon communications from ERCOT ISO. Constellation contends that, contrary to NERC's finding, Constellation *does* dispute that it is performing the communications services that are required under Reliability Standards applicable to generator operators. Constellation claims that it only agreed to perform the Qualified Scheduling Entity functions, i.e., limited communications functions pursuant to ERCOT ISO protocols. Thus, Constellation contends, a possible overlap of the ERCOT ISO communication requirements with the requirements of Reliability Standards cannot serve as the basis for registration.

16. Constellation further argues that NERC has misapplied the Registry Criteria definition of generator operator (the "entity that operates generating unit(s) and performs the functions of supplying energy and interconnected operations services"). According to Constellation, NERC has not explained how Constellation meets this definition. Constellation asserts that the generator operator definition applies to the entity that is responsible for directing and controlling the physical operations of a generation facility and does not apply to an entity that entered into a contract to purchase the output of and/or request the scheduling of an electric generation facility.<sup>15</sup> Constellation disputes NERC's finding that Power Resources operates the facility at Constellation's direction and contends that Power Resources has retained full operational control of the Power Resources facility. According to Constellation, the terms of the Tolling Agreement are typical commercial terms that are included in any agreement that provides unit contingent

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<sup>14</sup> Constellation Appeal at 10.

<sup>15</sup> *Id.* 13-14.

power, and NERC has failed to cite to any provision that gives Constellation authority to direct operations of the Power Resources facility.

17. Constellation also claims that, although NERC's analysis is based on the conclusion that a generation facility's interface with the independent system operator should be designated as a generator operator, Texas Regional Entity has not registered all Qualified Scheduling Entities as generator operators. Constellation points to several other tolling agreements it has with other generating facilities, noting that even when it serves as Qualified Scheduling Entity for the facility, Constellation is not always registered with NERC as the generator operator for the facility. Constellation also argues that NERC's decision is inconsistent with registrations in other regions and concurrent registration should be reserved for extraordinary circumstances.

### **C. Interventions, Comments and Answer**

18. Timely motions to intervene with comments were filed on August 11, 2008 by the Texas Regional Entity, NERC and Power Resources. On September 23, 2008, Shell Energy North America (US), L.P. (Shell) filed a motion to intervene out-of-time and comments. Constellation filed a motion for leave to answer and answer the comments by NERC, Texas RE and Power Resources. NERC filed a motion for leave to answer and answer to Shell's comments.

#### **1. NERC**

19. NERC comments that the registry decision is based on a straight-forward analysis of the NERC Registry Criteria, and is adequately supported. NERC states that the relationship between Power Resources and Constellation is "symbiotic," and Constellation clearly accepted some level of contractual responsibility through the Tolling Agreement. NERC states that it disagrees with Constellation's "implicit suggestion" that if parties refrain from explicitly referencing Reliability Standards, they can avoid resultant compliance obligations. Rather, NERC posits that where an entity actually performs and has assumed responsibility for activities that are governed by the NERC Reliability Standards, such an entity cannot unilaterally opt out of compliance. Thus, NERC asserts, by agreeing to serve as the Qualified Scheduling Entity for the Power Resources facility, Constellation has agreed to assume communications services related not only to ERCOT ISO, but also to the NERC Reliability Standards.

20. In response to Constellation's arguments that NERC mistakenly "merges" the Qualified Scheduling Entity and generator operator obligations, NERC claims that Constellation does not dispute that (1) it agreed to perform and is responsible for performing certain communications activities on behalf of the Power Resources facility and (2) the communications tasks that Constellation performs "arguably overlap" certain tasks required by Reliability Standards that apply to generator operators. According to NERC, Constellation misapprehends the Registry Criteria and the obligations it has

assumed pursuant to the Tolling Agreement. “By contractually agreeing to serve as the sole [Qualified Scheduling Entity] for the [Power Resources] Facility, Constellation has committed to perform communications services, which are subject not only to ERCOT protocols but also to the NERC Reliability Standards.”<sup>16</sup> NERC also reiterates the registry decision finding that Constellation has authority to direct operations of the Power Resources facility, subject to certain provisions in the Tolling Agreement related to power purchase rights, fuel supply obligations and scheduling rights.<sup>17</sup>

21. In response to Constellation’s argument that it lacks the information to independently communicate with ERCOT ISO, as the information to be transmitted is provided by Power Resources, NERC notes that Constellation’s registration as a generator operator does not change the parties’ contractual arrangements. NERC also asserts that Constellation’s “ability or authority to comply with any element of a Requirement in a Reliability Standard is sufficient to justify its registration.”<sup>18</sup>

22. NERC also comments that concurrent registration is appropriate because (1) the parties’ roles and responsibilities are clearly delineated by the Tolling Agreement, and (2) the parties have been unable to reach agreement on their own. NERC disagrees with Constellation’s position that concurrent registration is only appropriate in extraordinary circumstances. Finally, NERC contends that, contrary to Constellation’s assertion, there is no inconsistency with Constellation’s registration and generator operator registrations in other regions. NERC argues that ERCOT ISO’s market rules are unique because of the existence and role of Qualified Scheduling Entities under the ERCOT ISO Protocols. Further, NERC claims that Constellation admits that it has entered into a variety of contractual arrangements, which support differing forms of registration.

## 2. Texas Regional Entity

23. Texas Regional Entity supports Constellation’s registration as a generator operator. Texas Regional Entity contends that Constellation agreed to perform and to be responsible for the following generator operator activities: (1) submitting a generation commitment plan to ERCOT ISO and accepting responsibility for the accuracy of submitted resource generation plans; (2) communicating with ERCOT ISO concerning a planned outage or maintenance outage; (3) providing operational data to ERCOT ISO;

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<sup>16</sup> NERC Comments at 12-13.

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.* at 16.

(4) receiving reliability alerts from ERCOT ISO; and (5) receiving and conveying dispatch instructions.<sup>19</sup>

24. Texas Regional Entity explains the need to register Constellation as follows:

The Project is indisputably a bulk-power system asset. Pursuant to its agreements with [Power Resources] and under the ERCOT ISO regulatory regime, Constellation is obligated to perform activities and has responsibilities that fall within the NERC function of “Generator Operator.” No other entity performs the tasks or Requirement under Reliability Standards that Constellation performs in support of the Project. [Power Resources] also performs certain other activities that fall within the NERC [Generator Operator] function, but no other entity is responsible under contract or otherwise for ensuring the performance of the Tasks or Requirements that Constellation performs. That the parties chose or did not choose to name the responsibilities consistently with NERC “GOP” or ERCOT “QSE” nomenclature is irrelevant. Under the agreements in place and in every day practice, Constellation is responsible for undertaking the responsibilities of a [generator operator] (at least in significant part). Both Power Resources and Constellation have responsibilities, but neither has agreed to assume [generator operator] compliance responsibility for the other.<sup>20</sup>

25. Texas Regional Entity also addresses specific arguments raised by Constellation. Texas Regional Entity contends that Constellation meets the NERC Registry Criteria definition of generator operator (the entity “that operates the generating unit(s) and performs the functions of supplying energy and interconnected operations services”). While Constellation disputes that it operates the Power Resources facility or supplies energy and related services, Texas Regional Entity argues that Constellation’s position is based on a colloquial use of the term “operate” instead of applying the term as used in the Registry Criteria and NERC Functional Model. According to Texas Regional Entity, “interconnected operations services” is a “service (exclusive of basic energy and transmission services) that is required to support the reliability operation of

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<sup>19</sup> Texas Regional Entity Comments, Exhibit A, provides a table that correlates the requirements under the Tolling Agreement and ERCOT ISO Protocols to the NERC generator operator function “by task or relationship” as set forth in the NERC Functional Model. *See* NERC Reliability Functional Model: Functional Definitions and Responsible Entities, Version 4 at 47-48 (August 2008), *available at* [http://www.nerc.com/files/FM\\_Version\\_4\\_Clean\\_2008Aug25.pdf](http://www.nerc.com/files/FM_Version_4_Clean_2008Aug25.pdf).

<sup>20</sup> Texas Regional Entity Comments at 9.

interconnected Bulk Electric Systems.”<sup>21</sup> It then posits that, pursuant to agreement and regulation, Constellation operates the generating unit, supplies energy and conducts interconnected operations services. Thus, Texas Regional Entity concludes that the fact that Constellation is not physically present on the facility premises “is of no consequence” to the regulatory burden it has assumed.

26. Texas Regional Entity counters that Constellation need not expressly agree to become the generator operator to be properly registered for the function. Texas Regional Entity argues that registration is not dependent upon an entity’s assent but, rather, is based on what an entity owns, does, or is obligated to do. According to Texas Regional Entity, Constellation actually performs numerous tasks characteristic of a generator operator, as shown through the Qualified Scheduling Entity duties and Tolling Agreement obligations that correspond with Reliability Standard requirements.

27. Texas Regional Entity argues that if the Commission were to adopt Constellation’s arguments, a reliability gap would ensue because neither Constellation nor Power Resources expressly agreed to assume generator operator-related responsibilities. Only the concurrent registration of both Constellation and Power Resources, according to Texas Regional Entity, would prevent a reliability gap. Texas Regional Entity states that Constellation may be correct that it does not have control over every generator operator-related Requirement; that is why a concurrent registration is appropriate. Texas Regional Entity also notes that Constellation, as a Level 4 Qualified Scheduling Entity, is a significant “gatekeeper” of information to be provided to ERCOT ISO.

### **3. Power Resources, Ltd.**

28. Power Resources argues that NERC properly found that both Power Resources and Constellation should be concurrently registered as generator operator for the Power Resources facility. However, it asserts that NERC did not clearly delineate each party’s responsibilities for Reliability Standards to avoid a reliability gap. Power Resources contends that this must be done. According to Power Resources, concurrent registration is appropriate because Power Resources designated Constellation to perform certain generator operator-related services. As such, Constellation meets the registry criteria for the generator operator function. Further, Power Resources claims that Power Resources and Constellation perform separate and distinct responsibilities for the facility. Power Resources emphasizes that Constellation initiates communications for certain functions, such that Power Resources could not comply with the appropriate Reliability Standards absent consent from Constellation.

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<sup>21</sup> *Id.* at 24, quoting NERC Functional Model at 46.

#### **4. Shell**

29. Shell asks the Commission to reject NERC's argument that generator operator registration responsibility may be gleaned through a tolling agreement, status as a Qualified Scheduling Entity and possession of the ability to comply with a mandatory Reliability Standard. According to Shell, such arguments will lead to redundancies and uncertainty as to which entity is responsible for compliance.

### **III. Discussion**

#### **A. Procedural Matters**

30. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>22</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), the Commission will grant Shell's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

31. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>23</sup> prohibits an answer to an answer or protest unless otherwise permitted by the decisional authority. We are not persuaded to accept Constellation's and NERC's answers and will, therefore, reject them.

#### **B. Commission Determination**

32. The Commission finds that the record in this proceeding is insufficient for a complete decision on the merits, and remands the matter to NERC for further consideration and explanation. As is clear from the NERC registry decision and the pleadings, this proceeding revolves around whether the Tolling Agreement and obligations as a Level 4 Qualified Scheduling Entity for the Power Resources facility vests responsibility with Constellation as a generator operator pursuant to mandatory and enforceable Reliability Standards. While the Commission makes certain findings on the present record, the Commission believes that additional information is needed for the Commission to make a final determination in this matter. Because the Commission is remanding this matter, Constellation will remain on the NERC compliance registry as a

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<sup>22</sup> 18 C.F.R. § 385.214 (2008).

<sup>23</sup> 18 C.F.R. § 385.213(a)(2).

generator operator.<sup>24</sup> Further, while the remand is pending, the Commission encourages the parties to this proceeding to seek a voluntary resolution of the matter.

33. In the registry decision, NERC concluded that the Tolling Agreement addresses the respective obligations of Power Resources and Constellation to comply with “imminent” mandatory Reliability Standards.<sup>25</sup> While recognizing that the Tolling Agreement is silent with regard to obligations under the then-unfolding mandatory reliability scheme, NERC concluded that the timing of the execution of the Tolling Agreement -- after the enactment of EPAct 2005 and NERC’s certification as the ERO -- was grounds to reject arguments by both Constellation and Power Resources “that it could not be foreseen that the Tolling Agreement should address each entity’s compliance responsibilities with respect to NERC’s imminent mandatory and enforceable Reliability Standards. . . . To the contrary . . . [NERC] finds . . . the Tolling Agreement does address the parties’ respective obligations.”<sup>26</sup>

34. The Commission disagrees with NERC’s analysis on this point. The timing of execution of the Tolling Agreement in conjunction with the events leading up to the implementation of mandatory Reliability Standards does not provide any meaningful insight regarding the intent of the parties or the responsibilities conveyed by the Tolling Agreement. The Commission concludes that it is inappropriate to glean any intent with regard to responsibility for Reliability Standards from the date of execution.

35. On the other hand, the Commission is not persuaded by Constellation’s apparent position that, absent an express statement in the Tolling Agreement, the contract cannot be a source of conveying responsibility for compliance with mandatory Reliability Standards. As both NERC and Texas Reliability Entity advocate in their comments, if an agreement requires an entity to perform a task and makes the entity responsible for the performance of that task, the entity may be subject to mandatory Reliability Standards that pertain to the performance of such activities. We agree with NERC that, where an entity actually performs and has assumed responsibility for activities that are governed by the NERC Reliability Standards, such an entity cannot unilaterally opt out of compliance.

36. The Commission, however, has some factual concerns regarding what tasks and responsibilities Constellation may have assumed pursuant to the Tolling Agreement. The NERC registry decision, as well as NERC’s and Texas Regional Entity’s comments, suggest that Constellation, by agreeing to act as a Level 4 Qualified Scheduling Entity for

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<sup>24</sup> See *Mosaic Fertilizer, LLC*, 121 FERC ¶ 61,058, at P 35 (2007).

<sup>25</sup> NERC Registry Decision at 15-16.

<sup>26</sup> *Id.* at 16.

the Power Resources facility, is obligated to act as the sole communicator with ERCOT ISO on certain matters that are also consistent with the requirements of certain mandatory Reliability Standards. The registry decision and pleadings also suggest that Constellation has a larger role because, while Power Resources physically operates the facility, “it does so pursuant to directives of [Constellation].”<sup>27</sup>

37. With regard to the latter contention, the Commission is concerned that NERC may be overstating Constellation’s role. As both NERC and Constellation acknowledge, the Tolling Agreement is a power purchase agreement that governs Power Resources’ sales and Constellation’s purchases of electric generation capacity. As Constellation explains, the terms of the Tolling Agreement are typical commercial terms that are included in any agreement that provides unit contingent power. The Commission is not persuaded on the current record that the Tolling Agreement elevates Constellation from a power purchaser to a generator operator that directs operations at the Power Resources facility, while Power Resources simply conducts physical operations pursuant to Constellation’s direction.

38. The Commission believes that Constellation, by agreeing to act as the Qualified Scheduling Entity for the Power Resources facility, may be responsible as a generator operator for a discrete set of communications-related requirements set forth in the Reliability Standards applicable to generator operators. As NERC indicates, as a Level 4 Qualified Scheduling Entity, Constellation agrees to be the sole entity to engage in certain communications with ERCOT ISO, which is the reliability coordinator and balancing authority in the ERCOT ISO region. NERC contends that Constellation’s activities and obligations as a Level 4 Qualified Scheduling Entity overlap with certain requirements of mandatory Reliability Standards. NERC, however, does not provide any information that correlates Constellation’s activities as a Qualified Scheduling Entity with specific requirements of Reliability Standards.<sup>28</sup> The Commission, therefore, finds it difficult to determine this matter in the abstract, and lacks a clear understanding of the scope and nature of the obligations NERC expects of Constellation regarding compliance with mandatory Reliability Standards. We note that Power Resources’ one contention with NERC’s registry decision is that it does not provide a clear delineation of Power Resources’ and Constellation’s responsibility for compliance with requirements of Reliability Standards to assure that there are no gaps or overlaps.

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<sup>27</sup> *Id.*

<sup>28</sup> Texas Regional Entity provides a table that correlates the ERCOT ISO Protocols to the “tasks or relationships” of a generator operator as set out in the NERC Functional Model. The Commission, however, does not find this helpful to the task at hand.

39. The Commission, therefore, directs NERC to identify specific requirements of mandatory Reliability Standards applicable to generator operators that apply to Constellation. The analysis should indicate the correlation between Constellation's responsibilities as a Level 4 Qualified Scheduling Entity and specific provisions of mandatory Reliability Standards. Further, NERC is directed to provide the analysis to the Commission within 60 days of the date of this order.

40. The Commission agrees with NERC that, given the unique ERCOT ISO structure, particularly the role of Qualified Scheduling Entities, this proceeding does not raise concerns of possible inconsistencies with the registration of entities in other regions. The Commission, however, seeks a more thorough understanding of the role of the Qualified Scheduling Entity and how NERC and Texas Regional Entity have approached their registration. Constellation asserts that Texas Regional Entity and NERC adopted a blanket policy of registering a Qualified Scheduling Entity as a generator operator.<sup>29</sup> NERC disputes this, pointing to contractual differences as grounds for different treatment of different facilities.<sup>30</sup> The Commission notes that, based on publicly available information, it appears that approximately 144 Qualified Scheduling Entities participate in the ERCOT ISO market.<sup>31</sup> Further, Texas Regional Entity has registered approximately 59 entities as generator operators, eleven of which are identified by Texas Regional Entity as Qualified Scheduling Entities.<sup>32</sup>

41. Before making a final decision in this matter, the Commission seeks to better understand the potential effect of such a decision on entities that participate in the ERCOT ISO market and the Texas Regional Entity's registration process and determinations. It is not clear whether Texas Regional Entity has registered Constellation as the "outlier" or whether numerous other entities are impacted by NERC's registry decision. From the above statistics, it appears that Texas Regional Entity has registered only a small portion of all Qualified Scheduling Entities as generator operators, and that most generator operators are not Qualified Scheduling Entities. Further, the record in this proceeding does not indicate whether the "level" of a Qualified Scheduled Entity affects the registration determination.

42. Accordingly, the Commission remands the matter to NERC and directs NERC to supplement the record with additional information regarding the registration of Qualified

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<sup>29</sup> Constellation Appeal at 29.

<sup>30</sup> NERC Comments at 25.

<sup>31</sup> See <http://www.ercot.com/mktparticipants>.

<sup>32</sup> See <http://www.ercot.com/mktrules/compliance/tre>.

Scheduling Entities by the Texas Regional Entity. In providing this information, NERC should: (1) indicate whether Texas Regional Entity has registered entities (other than Constellation) as a generator operator based on the terms of a tolling agreement (or other contractual arrangement) and, if so, for each such registration, identify whether the agreement provided that an entity agreed to register with ERCOT ISO as the Qualified Scheduling Entity, agreed to register with Texas Regional Entity as the generator operator, or other relevant terms that led the registry decision; (2) explain whether distinctions in the level of a Qualified Scheduling Entity (e.g., Level 4 vs. Level 1) play a role in Texas Regional Entity's decision to register an entity as a generator operator; and (3) provide other information that will assist the Commission in understanding the role of Qualified Scheduling Entities in the ERCOT ISO and the potential effect of a final decision on entities that participate in the ERCOT ISO market and the Texas Regional Entity's registration process and determinations.

The Commission orders:

(A) The NERC registry determination regarding Constellation's registration as a generator operator in the ERCOT region is hereby remanded to NERC for further consideration, as discussed in the body of this order.

(B) NERC is hereby directed to provide information to supplement the record in this proceeding, within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

Document Content(s)

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