

146 FERC ¶ 61,092
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

North American Electric Reliability Corporation
Western Electricity Coordinating Council

Docket Nos. RR13-10-001
RR13-12-001
(not consolidated)

ORDER ON COMPLIANCE

(Issued February 12, 2014)

1. In this order, the Commission accepts compliance filings submitted by North American Electric Reliability Corporation (NERC) and Western Electricity Coordinating Council (WECC), submitted in response to the Commission's December 6, 2013 order addressing WECC's proposal to establish an independent reliability coordinator for the Western Interconnection (Peak Reliability).¹

I. Background

2. On June 20, 2013, the Commission issued a declaratory order conditionally approving WECC's plan to establish a new entity to perform the reliability coordinator and interchange authority functions in the Western Interconnection, currently performed by WECC.² In its request for declaratory order, WECC described its proposed transaction between WECC and Peak Reliability as a sub-delegation of the reliability coordinator and interchange authority function from WECC to Peak Reliability. In the

¹ *Western Electricity Coordinating Council*, 145 FERC ¶ 61,202 (2013) (December 6 Order).

² *Western Electricity Coordinating Council*, 143 FERC ¶ 61,239 (Declaratory Order), *reh'g denied*, 145 FERC ¶ 61,202 (2013), *appeal docketed sub nom. Edison Electric Institute v. FERC*, No. 14-1012 (D.C. Cir. Jan. 27, 2014).

Declaratory Order, the Commission indicated that final approval of WECC's proposal was conditioned on the submission of necessary governance documents.³

3. On August 26, 2013, NERC filed an amended delegation agreement between NERC and WECC (Amended NERC-WECC Delegation Agreement), which included proposed revisions to WECC's bylaws. On September 20, 2013, WECC filed documents addressing the formation of Peak Reliability. Specifically, WECC filed proposed Peak Reliability bylaws, a RC Agreement between WECC and Peak Reliability, and a draft Termination Agreement between WECC and Northeast Power Coordinating Council, Inc. (NPCC) (collectively, governance documents). WECC maintained that the governance documents were consistent with the Commission's Declaratory Order.

4. In the December 6 Order, the Commission conditionally accepted the proposed Peak Reliability governance documents and Amended NERC-WECC Delegation Agreement. The December 6 Order directed WECC to confirm that it intended to sub-delegate the reliability coordinator function to Peak Reliability, consistent with the Declaratory Order. If WECC so confirmed, the Commission directed WECC to submit revised Peak Reliability governance documents that expressly provided for sub-delegation. The Commission also directed WECC to address the concern raised by certain commenters regarding WECC's assumption, as the Regional Entity, of the compliance enforcement authority over the reliability coordinator function. Specifically, the Commission directed WECC to address the potential non-financial conflicts arising from WECC becoming responsible for investigating possible violations of the Reliability Standards by WECC that would have occurred when WECC served as the reliability coordinator in the Western Interconnection (i.e., prior to Peak Reliability assuming the reliability coordinator function). In addition, the December 6 Order directed WECC and NERC to indicate whether they sought waiver of Rule 1205 of the NERC Rules of Procedure, which prohibits the sub-delegation of responsibilities and authorities to non-Regional Entities. The December 6 Order also directed NERC to restore language in Exhibit E of the Amended NERC-WECC Delegation Agreement to effectuate the sub-delegation of the reliability coordinator function to Peak Reliability. The December 6 Order further directed WECC to submit a final Termination Agreement between WECC and NPCC.

³ Edison Electric Institute (EEI) sought rehearing of the Declaratory Order on July 22, 2013. The Commission denied rehearing in the December 6 Order. *See* December 6 Order, 145 FERC ¶ 61,202 at PP 2, 38-47.

II. Compliance Filings

A. NERC Compliance Filing (Docket No. RR13-10-001)

5. NERC confirms that it supports WECC's sub-delegation of the reliability coordinator function to Peak Reliability and states that "NERC intended to seek a waiver of the provision of § 1205 of the NERC Rules of Procedure."⁴ NERC maintains that its intention to seek a waiver was implicit in NERC's support for WECC's plan to bifurcate: "Clearly, as described in the December 6 Order, NERC has agreed to and has supported the sub-delegation of responsibilities and functions ... [n]ecessarily, therefore, by agreeing to and supporting the sub-delegation of responsibilities and functions ... NERC sought waiver of the provision of § 1205."⁵ Consistent with the December 6 Order, NERC submitted a revised version of the Amended NERC-WECC Delegation Agreement, restoring language in Exhibit E that NERC had previously proposed to delete.

B. WECC Compliance Filing (Docket No. RR13-12-001)

6. WECC "confirms that it intends to use a sub-delegation structure to implement the bifurcation of WECC and Peak Reliability and that it intends to sub-delegate its [reliability coordinator] functions to Peak Reliability."⁶ WECC includes a revised version of the RC Agreement that specifically references sub-delegation and thus "clearly reflects WECC's intent to sub-delegate its [reliability coordinator] activities to Peak Reliability."⁷ Further, WECC "requests that the Commission, to the extent necessary, waive Rule 1205 to permit WECC to sub-delegate to Peak Reliability."⁸

7. WECC addresses the potential non-financial conflicts arising from WECC, acting as the new compliance enforcement authority for the reliability coordinator function, potentially having to investigate actions of the WECC reliability coordinator that occurred prior to bifurcation. In response, WECC maintains that it has addressed the principal source of potential conflict (i.e., financial conflict) by provisions in the RC

⁴ NERC Compliance Filing at 1.

⁵ *Id.* at 4-5.

⁶ WECC Compliance Filing at 3.

⁷ *Id.*

⁸ *Id.*

Agreement that absolve WECC of any financial liability from any pre-bifurcation violations of Reliability Standards committed by the WECC reliability coordinator that were not known or identified prior to the effective date of the agreement, and that require Peak Reliability to assume such financial liability.⁹ As for any potential non-financial conflicts, WECC states that, currently, the WECC Regional Entity and WECC reliability coordinator are “organizationally and functionally separate business units with very limited interaction between employees or managers.”¹⁰ WECC explains that there are “no WECC Compliance Department employees or managers who formerly worked at the [reliability coordinator] ... [and] [t]here is no common management of the WECC Regional Entity and [reliability coordinator] activities below the level of WECC Chief Executive Officer [CEO].”¹¹ WECC also represents that “[n]o personnel currently involved in the [reliability coordinator] function will remain in WECC’s employ or organization ... [and] no WECC Compliance Department employees are transferring to Peak.”¹² WECC also provides a final version of the Termination Agreement, which WECC states is identical to the previous version of the Termination Agreement that WECC previously submitted to the Commission.

III. Notices and Responsive Pleadings

A. Docket No. RR13-10-001

8. Notice of NERC’s December 20, 2013 compliance filing was published in the *Federal Register*, 79 Fed. Reg. 124 (2014), with interventions and protests due on or before January 10, 2014. Western Interconnection Regional Advisory Body (WIRAB) filed timely comments. EEI filed a timely protest and comments. NERC filed a motion for leave to answer and an answer to EEI’s protest.

⁹ *Id.* Section 4.1 of the RC Agreement defines the effective date of the agreement as its execution date or January 1, 2014, whichever is later. *Id.* Attachment A (Revised Reliability Coordinator and Interchange Authority Agreement Between the Western Electricity Coordinating Council and Peak Reliability (Clean and Redline)) at 6-7.

¹⁰ *Id.* at 4.

¹¹ *Id.* WECC also states that its previous CEO retired December 31, 2013; that the new CEO comes from a utility in the eastern United States; and that the new CEO has no history or association with WECC or the reliability coordinator function in WECC. *Id.*

¹² *Id.* at 4-5.

B. Docket No. RR13-12-001

9. Notice of WECC's December 19, 2013 compliance filing was published in the *Federal Register*, 79 Fed. Reg. 128 (2014), with interventions and protests due on or before January 9, 2014. WIRAB filed timely comments. EEI filed a timely protest and comments. NERC filed a motion for leave to answer and an answer to EEI's protest.¹³

C. Protest and Comments

10. EEI states that the Commission should reject the WECC and NERC compliance filings. EEI's protest largely rests on the arguments raised in EEI's request for rehearing of the Declaratory Order. First, EEI asserts that Peak Reliability is not eligible to receive funding under section 215 of the Federal Power Act (FPA) because it is neither a Regional Entity nor the Electric Reliability Organization (ERO).¹⁴ Second, EEI maintains that the reliability coordinator and interchange authority functions are not statutory functions and thus cannot be funded under FPA section 215. Third, EEI argues that Rule 1205 of the NERC Rules of Procedure prohibits sub-delegation of responsibilities and authorities to non-Regional Entities, and that NERC has failed to satisfy the requirements for waiver of that provision. Fourth, EEI states that Peak Reliability is not eligible to receive FPA section 215 funding because it will be engaged in operational activities. Fifth, EEI maintains that the WECC compliance filing "fails to comply with the December 6 Order because it does not achieve a sub-delegation as modeled in the NERC-WECC delegation agreement."¹⁵

11. WIRAB urges the Commission to accept the WECC and NERC compliance filings. WIRAB maintains that the prompt acceptance of the compliance filings is critical to the successful bifurcation of WECC into WECC and Peak Reliability.

D. NERC Answer

12. NERC states that EEI, in repeating arguments that the Commission rejected in the December 6 Order, raises arguments that are beyond the scope of the compliance filings. Accordingly, NERC states that the Commission should reject EEI's arguments as beyond the scope of this proceeding. NERC further states that waiver of Rule 1205 of the NERC Rules of Procedure is permissible and that NERC complied with the December 6 Order

¹³ The WIRAB, EEI, and NERC responsive pleadings were filed in both Docket Nos. RR13-10-001 and RR13-12-001.

¹⁴ 16 U.S.C. § 824o (2012).

¹⁵ EEI Protest at 5.

by confirming that it intended to seek waiver of Rule 1205 and by explicitly seeking such a waiver in NERC's compliance filings.

IV. Discussion

A. Procedural Matters

1. Docket No. RR13-10-001

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept NERC's answer because it provided information that assisted us in our decision-making process.

2. Docket No. RR13-12-001

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept NERC's answer because it provided information that assisted us in our decision-making process.

B. Substantive Issues

15. The Commission finds that the WECC and NERC compliance filings satisfy the requirements in the December 6 Order. WECC confirmed that it is sub-delegating the reliability coordinator function to Peak Reliability, and WECC submitted a revised RC Agreement that explicitly reflects that structure.¹⁶ Moreover, WECC and NERC expressly sought waiver of Rule 1205 of the NERC Rules of Procedure to effectuate the sub-delegation.¹⁷ NERC also provided a revised version of the Amended NERC-WECC Delegation Agreement that restored the language in Exhibit E that, in the first instance, delegates the reliability coordinator function to WECC so that the reliability coordinator function could then be sub-delegated by WECC to Peak Reliability. With respect to the non-financial conflict issue, the Commission finds that WECC adequately addressed that concern by explaining, among other things, that no WECC reliability coordinator personnel will remain at the WECC Regional Entity post-bifurcation and that no WECC

¹⁶ WECC Compliance Filing, Attachment A (Revised Reliability Coordinator and Interchange Authority Agreement Between the Western Electricity Coordinating Council and Peak Reliability (Clean and Redline)) at Section 1.1.

¹⁷ WECC Compliance Filing at 3-4; NERC Compliance Filing at 4-5.

Compliance Department employees will be joining Peak Reliability.¹⁸ In addition, WECC submitted a final version of the Termination Agreement between WECC and NPCC. Accordingly, we determine that the WECC and NERC filings comply with the December 6 Order. However, we direct WECC to submit executed copies of the RC Agreement and Termination Agreement, and NERC to submit an executed Amended NERC-WECC Delegation Agreement in informational filings, within 30 days of the date of issuance of this order. Exhibit B of the Termination Agreement should be submitted to the Commission on a non-public basis.

16. We agree with NERC that the December 6 Order rejected almost all of the arguments in EEI's protest and that EEI's arguments are beyond the scope of the compliance filings.¹⁹ In the December 6 Order, the Commission affirmed that Peak Reliability would be eligible for FPA section 215 funding based on the conditions in the Declaratory Order (i.e., WECC sub-delegates the reliability coordinator function to Peak Reliability).²⁰ In reaching that determination, the December 6 Order rejected EEI's arguments that Peak Reliability is ineligible to receive funding under FPA section 215 because it is not a Regional Entity or the ERO and that the reliability coordinator function is not a statutory function.²¹ The December 6 Order also affirmed that the reliability coordinator in the Western Interconnection does not exercise day-to-day operational control of the Bulk-Power System and that Peak Reliability, while independent of WECC, would still ultimately be subject to Commission and NERC oversight.²²

17. We also conclude that waiver of Rule 1205 of the NERC Rules of Procedure is appropriate in this instance. EEI argues that WECC and NERC have not fulfilled the requirements for waiver in their compliance filings. EEI maintains that the standard for waiver is set forth in Section 100 of the NERC Rules of Procedure and requires: (1) that an entity be unable to comply with an applicable rule; (2) that the entity notify NERC in writing of the non-compliance and the reasons for non-compliance; and (3) that NERC determine that the rule cannot practically be complied with. Separately, EEI claims that

¹⁸ WECC Compliance Filing at 4-5.

¹⁹ EEI's protest raises only one new issue regarding waiver of Rule 1205 of the NERC Rules of Procedure, which is addressed below.

²⁰ December 6 Order, 145 FERC ¶ 61,202 at P 40.

²¹ *Id.* PP 40-47.

²² *Id.* PP 42-44.

“there is no indication from the text of Rule 100 that this provision permits NERC to waive any Rule of Procedure it deems appropriate.”²³

18. We are not persuaded by EEI’s arguments. In general, agencies have the authority, in individual cases, to waive or relax regulations provided the waiver does not affect the statutory or constitutional rights of individuals.²⁴ For example, courts have explained that, “[w]here any administrative rule, although considered generally to be in the public interest, is not in the public interest as applied to particular facts, an agency should waive application of the rule.”²⁵ The Commission has the ultimate authority regarding the approval and enforcement of the ERO’s rules in the United States.²⁶ We find that WECC and NERC have adequately explained why waiver of Rule 1205 is appropriate and in the public interest in this case. Moreover, waiver of Rule 1205 does not affect the statutory or constitutional rights of EEI or any other entity. Waiver in this case is also appropriate because it will allow the reliability coordinator function in the Western Interconnection to continue to be performed by the entity formerly known as the WECC reliability coordinator (now Peak Reliability) through a sub-delegation from WECC to Peak Reliability. Accordingly, because the sub-delegated authority will be

²³ EEI Protest at 18.

²⁴ See generally *Corpus Juris Secundum*, Public Administrative Law and Procedure § 181 (Excusing noncompliance; waiver or suspension) (updated Dec. 2013).

²⁵ *P & R Temmer v. F.C.C.*, 743 F.2d 918, 929 (D.C. Cir. 1984) (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943)).

²⁶ 16 U.S.C. § 824o(f) (“The [ERO] shall file with the Commission for approval any proposed rule or proposed rule change...”); 18 C.F.R. § 39.2(b) (“All entities subject to the Commission’s reliability jurisdiction ... shall comply with ... applicable [ERO] and Regional Entity Rules made effective under this part”). See also *Southwest Power Pool, Inc.*, 139 FERC ¶ 61,264, at P 8 (2012) (“The Commission has granted waiver requests in certain circumstances where an emergency situation or an unintentional error was involved. Waiver, however, is not limited to those circumstances. Where good cause for a waiver of limited scope exists, there are no undesirable consequences, and the resultant benefits to customers are evident, the Commission has found that a one-time waiver is appropriate.”).

administered by a competent entity free of any conflict of interest, waiver of Rule 1205 is appropriate in this instance.²⁷

19. Separately, the Commission finds that WECC and NERC satisfied any procedural requirements for seeking waiver that may exist in Section 100 of the NERC Rules of Procedure. As stated in the December 6 Order, NERC has flexibility in enforcing its own Rules of Procedure, which is provided in Section 100 of the NERC Rules of Procedure. Section 100 states in relevant part that:

Any entity that is unable to comply or that is not in compliance with a NERC Rule of Procedure shall immediately notify NERC in writing, stating the Rule of Procedure of concern and the reason for not being able to comply with the Rule of Procedure.

NERC shall evaluate each case and inform the entity of the results of the evaluation. If NERC determines that a Rule of Procedure has been violated, or cannot practically be complied with, NERC shall notify the Applicable Governmental Authorities and take such other actions as NERC deems appropriate to address the situation.

20. EEI argues that Section 100 allows enforcement flexibility regarding future violations of the Rules of Procedure only when compliance would be impossible rather than by choice. However, Section 100 does not explicitly limit the justifications for waiver to the impossibility of compliance only. Such an interpretation would be incongruous with the provision of Section 100 that allows for enforcement flexibility when a Rule of Procedure violation has occurred. In that situation, Section 100 only requires NERC to “determine[] that a Rule of Procedure has been violated” before taking “appropriate action to address the situation,” without any mention of whether the violation could have been avoided. Accordingly, a reasonable interpretation of Section 100 of the NERC Rules of Procedure allows entities, before a violation has occurred, to seek waiver from NERC without having to establish that it would be impossible to comply. Additionally, by allowing NERC to take “such other actions as NERC deems appropriate to address the situation,” Rule 1205 provides broad discretion for NERC to remedy the situation, which may include seeking waiver of the requirement.

²⁷ EEI concedes that bifurcation of WECC into a new WECC Regional Entity and an independent reliability coordinator (Peak Reliability) is a positive development. EEI Protest at 3-4 (“EEI continues to fully support WECC’s bifurcation ... bifurcation is praiseworthy not only from a corporate governance perspective, but also from a reliability functional perspective”).

21. In terms of the written notification described in Section 100, we find that WECC satisfied that requirement. By filing a request for declaratory order and subsequently filing the Peak Reliability governance documents and compliance filing for Commission acceptance, WECC announced its intention to sub-delegate the reliability coordinator function to Peak Reliability, a non-Regional Entity, and explained the basis for its planned bifurcation. In their respective compliance filings, WECC and NERC have both explicitly sought waiver of Rule 1205. Accordingly, to the extent necessary, the Commission finds that the procedural requirements of Section 100 have been satisfied.

The Commission orders:

(A) The compliance filings submitted by WECC and NERC are hereby accepted, as discussed in the body of this order.

(B) WECC and NERC are directed to submit executed agreements, on an informational basis, as discussed above, within 30 days of the date of issuance of this order.

(C) Pursuant to the Commission's 2014 NERC Business Plan and Budget Order, Peak Reliability is hereby authorized to issue billing invoices to fund the fiscal 2014 operations of Peak Reliability.²⁸

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁸ *North American Electric Reliability Corp.*, 145 FERC ¶ 61,097, at PP 2, 35 (2013) (NERC 2014 Business Plan and Budget Order).