

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Availability of Certain North American)
Electric Reliability Corporation)
Databases to the Commission)**

Docket No. RM15-25-000

**COMMENTS OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING**

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The North American Electric Reliability Corporation (“NERC”) hereby provides Comments on the Federal Energy Regulatory Commission (“Commission”) Notice of Proposed Rulemaking (“NOPR”) proposing to issue a new regulation at 18 C.F.R. §39.11(c) (“Proposed Rule”) that would require NERC to provide the Commission and its staff access to certain databases compiled and maintained by NERC. Specifically, the Commission seeks access, on a non-public and ongoing basis, to view and download data from NERC’s (i) Transmission Availability Data System (“TADS”) (including data on transmission outages), (ii) Generating Availability Data System (“GADS”) (including data on generation outages), and (iii) protection system misoperations databases.¹ The NOPR states that the Proposed Rule would provide the Commission with information necessary to (i) determine the need for new or modified Reliability Standards, and (ii) better understand NERC’s periodic reliability and adequacy assessments.²

NERC recognizes the Commission’s objective to obtain data necessary for Commission oversight of reliability of the Bulk Power System (“BPS”) and the Electric Reliability Organization (“ERO”), pursuant to section 215 of the Federal Power Act (“FPA”).³

¹ *Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, 152 FERC ¶ 61,208, at P 1 (2015) (“NOPR”).

² *Id.*

³ 16 U.S.C. §824o.

Accordingly, NERC proposes an alternative to the Proposed Rule, as detailed in Section IV.A. below, to provide the Commission access to necessary information (“NERC’s Proposed Alternative”) in a manner that would continue to foster stakeholder engagement and participation in voluntary data sharing.

Specifically, NERC’s Proposed Alternative would provide the Commission with anonymized versions of TADS, GADS, and protection system misoperations data under a two-phase approach facilitated by a Commission and NERC staff Information Sharing Working Group established within 90 days of the Commission’s order on the NOPR. This proposal would support the Commission’s objective to obtain data necessary to implement its statutory obligations, in a manner that enhances collaborative and coordinated efforts to improve reliability and avoids challenges presented by the Proposed Rule that would chill stakeholder participation in the framework for reliability established by Congress and increase risk to reliability of the BPS.

I. EXECUTIVE SUMMARY

In 2005, Congress passed the Energy Policy Act of 2005 (“EPAct 2005”), enacting section 215 of the FPA to strengthen the institutional framework for reliability of the BPS.⁴ This unique statutory construct depends on trust and collaboration. Over the past decade, the Commission and NERC, as the Commission-certified ERO, have successfully collaborated with stakeholders to improve reliability of the BPS by implementing the statutory model established by Congress. These efforts have resulted in great strides towards enhanced reliability of the grid.

As stressed in NERC’s *Five-Year ERO Performance Assessment Report*, “the number of BPS transmission-related events resulting in loss of firm load, other than events caused by

⁴ Pub. L. No. 109-58, Title XII, Subtitle A, 119 Stat. 594, at 941, §1211 to be codified at 16 U.S.C. §824o (2005). *See also, infra* n. 36-37 (including accompanying text).

factors external to the transmission system’s actual performance (i.e., weather-initiated events), decreased from an average of ten per year over a ten year period (2002 through 2011) to seven in 2013.”⁵ In addition, as provided in NERC’s *State of Reliability 2015* report, non-weather initiated transmission-related events have dropped even further to fewer than four per year – *fewer than half* of the annual average during 2002-2011.⁶ NERC also reported that average transmission outage severity has continued decreasing, that protection system misoperations are declining, and that the number of declared Energy Emergency Alert Level 3 Events is declining.⁷ These examples demonstrate that Commission and ERO Enterprise⁸ implementation of section 215 of the FPA is materially improving reliability of the BPS, as intended by Congress.⁹

This success is due, in large part, to information mandatorily and voluntarily shared by stakeholders with the ERO Enterprise to help ensure that the ERO has the information necessary to fulfill its statutory duty and provide for a reliable and secure BPS.¹⁰ Stakeholders frequently share such detailed and attributable information on a voluntary basis. Based on NERC’s

⁵ *North American Electric Reliability Corporation Five-Year Electric Reliability Organization Performance Assessment Report*, Docket No. RR14-5-000, at pp. 2-3 (filed July 21, 2014) (“*Five-Year ERO Performance Assessment Report*”). *Order on the Electric Reliability Organization’s Five-Year Performance Report*, 149 FERC ¶ 61,141, at PP 1-2 (2014) (stating NERC “highlight[ed] activities and accomplishments demonstrating how the ERO is improving the performance of, and mitigating risks to, the Bulk-Power System.... we accept NERC’s Performance Assessment, [and] find that NERC continues to satisfy the statutory and regulatory criteria for certification as the ERO”) (“*Five Year Order*”).

⁶ *State of Reliability 2015 Report*, at p. 9 (May 2015), available at, <http://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/2015%20State%20of%20Reliability.pdf>.

⁷ *Id.*, at pp. 8-11.

⁸ The eight Regional Entities are: (i) Florida Reliability Coordinating Council, Inc.; (ii) Midwest Reliability Organization; (iii) Northeast Power Coordinating Council, Inc.; (iv) ReliabilityFirst Corporation; (v) SERC Reliability Corporation; (vi) Southwest Power Pool Regional Entity; (vii) Texas Reliability Entity, Inc.; and (viii) Western Electricity Coordinating Council. These Regional Entities and NERC constitute the “ERO Enterprise.”

⁹ *See also, Transcript of the 6/18/15 notice held in Washington, DC re Commissioner-Led Reliability Technical Conference*, Docket No. AD15-7-000, at p. 35 (June 4, 2015) (“2015 Transcript”) (including Chairman Bay’s statement, “Gerry and Tom, I was very impressed with the positive news in your State of Reliability report and the way in which you used data and analytics to identify some encouraging signs.”).

¹⁰ *Five-Year ERO Performance Assessment Report*, at p. 7 (reporting that NERC’s initiatives to enhance reliability included collecting and sharing information on threats to security and identifying, prioritizing, and communicating information on, risks to the BPS).

consistent efforts over the past several years to build the trust and confidence of a highly regulated industry, stakeholders share a wealth of data and information with NERC and the Regional Entities.¹¹ The high quality of data provided by stakeholders enables the ERO to conduct data-driven analyses used to develop proactive solutions to address risks to reliability. In the *Five Year Order*, accepting NERC’s most recent *Five-Year ERO Performance Assessment*, the Commission cited NERC “efforts to address protection system misoperations and transmission right-of-way clearances as examples of situations where the ERO Enterprise was able to use information from the Regional Entities to develop strategies to address potential risks.”¹²

NERC recognizes the Commission’s objective as articulated under the NOPR for access to data necessary to support the Commission’s statutory oversight role and seeks to further support these successful efforts over the past decade to improve reliability. NERC’s Proposed Alternative would give Commission staff access to anonymized versions of the data sought in the NOPR under a two-phase process facilitated by a Commission and NERC staff Information Sharing Working Group overseen by senior management at both the Commission and NERC and by the NERC Board of Trustees.

Under the first phase of NERC’s Proposed Alternative, NERC would provide Commission staff with anonymized TADS, GADS, and protection system misoperations data within 90 days of the Commission’s order on the NOPR. Under the second phase of NERC’s Proposed Alternative, NERC staff would work collaboratively with Commission staff through an Information Sharing Working Group to develop NERC-managed tools to provide Commission staff access to anonymized versions of TADS, GADS, and protection system misoperations

¹¹ 2015 Transcript, at pp. 42-43 (June 4, 2015).

¹² *Five Year Order*, at P 66 (describing NERC’s *Five-Year ERO Performance Assessment*).

databases. The Information Sharing Working Group would also provide an enduring path forward to identify and structure Commission access to necessary data. This approach would also enable Commission and ERO staff to coordinate and develop meaningful information from data as necessary on a going forward basis.

NERC's Proposed Alternative relies on Chairman Bay's suggestion during the 2015 Reliability Technical Conference on investigating a means to mask NERC-collected data to support analysis on an anonymized basis and thereby mitigate concerns regarding confidentiality. During the 2015 Reliability Technical Conference, Chairman Bay acknowledged concerns regarding confidentiality, and stated:

I can certainly sympathize with that challenge, but I'm wondering whether[,] if the data were masked so that the identity of the entity were not revealed, and maybe in a case of academics, if they signed some sort of nondisclosure agreement, so that they would not be reporting on any single event but rather presenting some sort of analysis that essentially looked at the data as a whole, whether that could mitigate some of those concerns.¹³

In addition, NERC's Proposed Alternative is in accordance with Commissioner LaFleur's NOPR concurrence underscoring the importance of coordinated Commission and ERO activities to ensure reliability of the BPS, and stating:

...under section 215 of the FPA, NERC and the Commission have a unique relationship, since Congress vested a significant amount of authority over the standards process in the Electric Reliability Organization (i.e., NERC) and clearly prescribed the Commission's oversight role. It is important that we recognize the distinction between that oversight role and NERC's primary responsibility to monitor reliability issues and propose standards to address them. Ultimately, I believe our efforts to sustain and improve the reliability of the bulk electric system are furthered by mutual trust and shared priorities between the Commission and NERC.¹⁴

¹³ 2015 Transcript, at p. 44 (June 4, 2015).

¹⁴ NOPR, at Commissioner LaFleur Concurrence.

NERC's Proposed Alternative would support collaborative and coordinated efforts to ensure reliability of the BPS, consistent with these Commission statements. In contrast, the Proposed Rule would undermine accomplishments improving reliability by operating in tension with section 215 of the FPA and the Commission's ERO regulations. As detailed in Section IV.B. – E., the Proposed Rule creates material challenges that would chill industry collaboration with the ERO and undermine the regulatory framework for reliability. In particular, the Proposed Rule would create undue risk to confidentiality and friction with the regulatory construct established under section 215 of the FPA that provided the Commission's oversight role with regard to reliability and centralized responsibility for day-to-day activities to ensure reliability within a Commission-certified ERO. These consequences would be counterproductive to the Commission's objective under the NOPR.

In an environment where perceptions are increasingly treated as reality, the challenges presented by the Proposed Rule create significant risk that the ERO Enterprise would cease receiving timely, high quality, in-depth data and information necessary for effective operation of the statutory institutional framework for reliability, reduce the ERO's ability to assess reliability risks, and consequently increase risk to reliability. For the reasons discussed herein, the Commission should work with NERC to implement NERC's Proposed Alternative to the Proposed Rule. NERC's Proposed Alternative would support the shared priorities pursued by all within the Commission and ERO Enterprise and maximize opportunities created by section 215 of the FPA to improve reliability of the BPS.

II. COMMUNICATIONS

Notices and communications with respect to these Comments may be addressed to the following:¹⁵

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III. BACKGROUND

The Proposed Rule would require NERC to provide the Commission and its staff with access, on a non-public and ongoing basis, to view and download data from NERC’s TADS, GADS, and protection system misoperations databases (together, the “implicated data”).¹⁶ The Commission explains that the Proposed Rule is designed to provide the Commission with information necessary to determine the need for new or modified Reliability Standards and better understand NERC’s periodic reliability and adequacy assessments.¹⁷ Therefore, the NOPR intends to achieve Commission access to data necessary for implementation of the Commission’s statutory oversight role delineated in section 215 of the FPA. As discussed in Section IV.B.

¹⁵ Persons to be included on the Commission’s service list are identified by an asterisk. NERC respectfully requests a waiver of Rule 203 of the Commission’s regulations, 18 C.F.R. §385.203, to allow the inclusion of more than two persons on the service list in this proceeding.

¹⁶ NOPR, at P 1. Although not stated in the Proposed Rule itself, the NOPR reflects the Commission’s intent to limit its proposal to data regarding facilities within the United States (“U.S.”). *Id.*; *cf.* Proposed Rule.

¹⁷ *See*, NOPR, at PP 1 and 15.

below, section 215 of the FPA centralized responsibility for day-to-day activities to ensure reliability within a Commission-certified ERO and assigned the Commission oversight authority.

The NOPR also includes a very high-level description of TADS, GADS, and protection system misoperations data.¹⁸ As background, NERC clarifies certain factual issues relating to the scope and confidentiality of the implicated data to help ensure an accurate record. NERC has also published hundreds of pages on the NERC website detailing the collection, management, and disclosure of TADS, GADS, and protection system misoperations data.¹⁹ In light of data complexities and publicly available information, the background below clarifies key facts influencing NERC's Proposed Alternative.

A. The Proposed Rule Implicates Mandatory and Voluntary Data.

The NOPR implies that the Proposed Rule affects data submitted to NERC pursuant to mandatory data reporting obligations in effect after implementation of EPAct 2005.²⁰ However, the Proposed Rule would also affect detailed, attributable, and identifying data that stakeholders voluntarily provided to enhance reliability assurance activities and support the various programs that facilitate the ERO's mission. The ERO Enterprise uses both mandatorily provided and voluntarily submitted information to inform risk identification, development of risk profiles, and support ERO risk-based program areas, such as registration, reliability assessment, and Reliability Standard development. For example, TADS includes data voluntarily shared by non-U.S. Transmission Owners and data voluntarily shared prior to 2015 on Bulk Electric System

¹⁸ NOPR, at PP 5-14.

¹⁹ See e.g., Transmission Availability Data System (TADS) webpage, *available at*, <http://www.nerc.com/pa/RAPA/tads/Pages/default.aspx>; Generating Availability Data System (GADS) webpage, *available at*, <http://www.nerc.com/pa/RAPA/gads/Pages/default.aspx>; and Protection System Misoperations webpage, *available at*, <http://www.nerc.com/pa/RAPA/ri/Pages/ProtectionSystemMisoperations.aspx>.

²⁰ NOPR, at PP 6, 9, and 12.

transmission elements under 200 kV.²¹ GADS includes data voluntarily provided on renewable generation, data voluntarily provided from generating units with less than 20 MW of capacity, data voluntarily provided prior to 2013 from generating units with less than 50 MW of capacity, and data being voluntarily shared for certain GADS event record fields.²² Protection system misoperations data includes voluntary data currently shared by non-U.S. entities and data shared with Regional Entities prior to EPA Act 2005.²³

The voluntary TADS, GADS, and protection system misoperations data described above, also serve as examples of the varying levels of voluntary information provided to the ERO

²¹ See e.g., *TADS Phase I Data Request Summary*, available at, http://www.nerc.com/pa/RAPA/tads/TADSTF%20Archives%20DL/TADS_Data_Request_Summary.pdf; *TADS Phase I final report* (Sept. 26, 2007) (“TADS Phase I Data Request”), available at, http://www.nerc.com/docs/pc/tadstf/TADS_PC_Revised_Final_Report_09_26_07.pdf; *TADS Phase II final report* (Sept. 11, 2008), available at, http://www.nerc.com/pa/RAPA/tads/TransmissionAvailabilityDataSyatemRF/TADS_Phase_II_Final_Report_091108.pdf; and *TADS Data Reporting Instruction Manual* (Dec. 9, 2010), available at, <http://www.nerc.com/pa/RAPA/tads/Transmission%20Availability%20Data%20System%20Working%20Grou/Data%20Reporting%20Instr%20Manual%2020101202a%20clean.pdf>.

²² See e.g., *Generating Availability Data System: Mandatory Reporting of Conventional Generation Performance Data* (July 2011) (“GADS Data Request”), available at, http://www.nerc.com/pa/RAPA/gads/MandatoryGADS/Revised_Final_Draft_GADSTF_Recommendation_Report.pdf; GADS webpage, Generation Resource Mix Dashboard, available at, <http://www.nerc.com/pa/RAPA/gads/Pages/GADS-Generation-Resource-Mix-Dashboard.aspx> (stating, “Before 2012, much of the data was voluntarily shared with GADS. Since 2012, GADS has increased its range of mandatory reporting units. Data from before 2012 is still under review, since comparison of pre-2012 data and post-2012 data will be skewed.”); and GADS Data Reporting Instructions (Jan. 22, 2015), available at, <http://www.nerc.com/pa/RAPA/gads/Pages/Data%20Reporting%20Instructions.aspx> (noting that GADS reporting began in 1982).

²³ See, *Request for Data or Information: Protection System Misoperation Data Collection* (Aug. 14, 2014) (“Protection System Misoperations Data Request”), available at, http://www.nerc.com/pa/RAPA/ProctectionSystemMisoperations/PRC-004-3%20Section%201600%20Data%20Request_20140729.pdf. NERC clarifies that there is presently no precise “database” for protection system misoperations data. NERC is working to develop a protection system misoperations data platform. Since prior to the 2006, registered entities submitted data related to protection system misoperations to Regional Entities pursuant to varying procedures. *Id.*, at p. 15. The Reliability Standard has been mandatory since Order No. 693 in 2007. See, *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. and Regs. ¶ 31,242, 118 FERC ¶ 61,218, at P 1469 (2007). In late 2010, the ERO Enterprise began aligning protection system misoperations data collection to facilitate Regional Entities sharing that information with NERC. Protection System Misoperations webpage, available at, <http://www.nerc.com/pa/RAPA/ri/Pages/ProtectionSystemMisoperations.aspx>. This unusual aspect of protection system misoperations data collection is an example of the type of data complexities managed by NERC, which NERC’s Proposed Alternative would enable the Commission and NERC staff to navigate.

Enterprise on a regular basis, which help fill gaps that might exist if entities merely responded to mandatory data requests, without going further. For example, the voluntary information shared in GADS on renewable generation and generation under 20 MW supports NERC's efforts to gauge potential impact of non-conventional and smaller generation on the grid. NERC's review of wind-generation GADS data, recently led NERC to impose mandatory GADS reporting obligations for wind turbine facilities of 75 MW of capacity or greater starting January 1, 2017. This illustrates how data sharing between stakeholders and the ERO Enterprise is part of an ongoing feedback loop, progressively evolving towards increasingly sophisticated comprehension of issues that might materially influence reliability of the grid. As explained in Section IV.E. below, the Proposed Rule could have a negative effect on the quality and level of data voluntarily shared with the ERO Enterprise.

B. Confidentiality of Identifying Data and Disclosure.

As the NOPR states, confidential treatment applies to GADS, TADS, and protection system misoperations data submitted to NERC.²⁴ This is consistent with Section 1500 and Rule 1605 of the Commission-approved NERC Rules of Procedure (discussed in Section IV.B.1, below). Confidential treatment is appropriate from a security perspective, because the detailed data implicated by the NOPR could be misused to target vulnerabilities in the BPS. Further, confidential treatment is appropriate, because “the provider of the information has a commercial interest in the information submitted.”²⁵

²⁴ See e.g., NOPR, at PP 8, 11, and 14. TADS Phase I Data Request, at Section 2.4.7; GADS Data Request, at p. 3, Appendix V, at p. 40-41, and Appendix VI; and Protection System Misoperations Data Request, at p. 15.

²⁵ *Baker & Hostetler LLP v. U.S. Dept. of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). The D.C. Circuit, for example, upheld a FOIA exemption for confidential commercial information disclosed to the non-profit trade organization Institute for Nuclear Power Operations and produced to the Nuclear Regulatory Commission. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, at 880 (D.C. Cir. 1992) (en banc).

NERC has clarified, however, that confidential treatment does not preclude disclosure of data that does not inadvertently disclose Confidential Information or Critical Energy Infrastructure Information (“CEII”).²⁶ This is an important distinction, because, as acknowledged in the NOPR, NERC regularly and publicly publishes aggregated TADS, GADS, and protection system misoperations data.²⁷

In the GADS context, NERC also expends considerable resources to produce automated personal computer versions of the GADS Generating Availability Report. This “pc-GAR” suite of products provides users with access to anonymized reliability information from the over 5,000 generating units reporting under GADS, and allows users to select from hundreds of data combinations.²⁸ The system provides view and download access to anonymized GADS data, and provides users the ability to generate reports based on Region, generator type, and fuel type.²⁹ NERC has provided the Commission and its staff with aggregate pc-GAR data in the past. The anonymized and aggregated data available for each category of implicated data reflect access to significant amounts of the types of information described in the NOPR. As detailed in Section IV.A. below, NERC’s Proposed Alternative would result in regular Commission access to pc-GAR and the development of similar tools to provide the Commission and its staff with anonymized versions of TADS, GADS, and protection system misoperations data.

²⁶ CEII is defined as “Specific engineering vulnerability, or detailed design information about proposed or existing critical infrastructure that: i. Relates details about the production, generation, transportation, transmission, or distribution of energy; ii. Could be useful to a person in planning an attack on critical infrastructure; iii. Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. §552; and iv. Does not simply give the general location of the critical infrastructure.” 18 C.F.R. §388.113(c).

²⁷ NOPR, at PP 8, 11, and 14.

²⁸ Under pc-GAR, anonymized data from U.S. and non-U.S. facilities is available for review.

²⁹ See, GADS pc-GAR webpage, available at, <http://www.nerc.com/pa/RAPA/gads/Pages/pc-GAR.aspx>.

IV. COMMENTS

NERC recognizes the Commission's objective, as articulated in the NOPR, for access to data necessary to implement the Commission oversight role delineated by Congress in EAct 2005 and section 215 of the FPA. NERC has continuously focused on operating as a data-driven, forward-looking, organization, coordinating with a technically complex industry, to identify solutions to manage risk to and improve reliability of the BPS. NERC's Proposed Alternative would support these goals, whereas the Proposed Rule is counterproductive to these goals and in tension with Congressional intent (*see infra*, Section IV.B. – E.). In particular, the Proposed Rule would operate in tension with section 215 of the FPA to the extent that it results in duplicative Commission responsibility for activities delegated to the ERO and would create undue risks to confidentiality that chill information sharing. This would increase risks to reliability of the BPS.

The statutory model for reliability within section 215 of the FPA is carefully designed to maximize opportunities for international technical expertise to coalesce around the ERO, in an environment that supports trust and collaboration. This special regulatory construct is unlike others within the FPA and implicitly recognizes the manner in which issues such as confidentiality and compliance influence the practicalities of ensuring reliability of the North American BPS. Therefore, NERC proposes that the Commission accept NERC's Proposed Alternative, as outlined in Section IV.A. below, instead of issuing the Proposed Rule. This approach would enable the Commission to leverage opportunities presented by section 215 of the FPA and NERC's resulting comprehensive risk management process and reliability analytics.

A. Overview of NERC's Proposed Alternative.

NERC's Proposed Alternative applies a two-phase approach to provide the Commission with anonymized versions of TADS, GADS, and protection system misoperations data and

establish a path forward for identifying and structuring Commission access to necessary data. First, NERC staff would provide Commission staff an initial set of anonymized TADS, GADS, and protection system misoperations data within 90 days of the Commission's order on the NOPR. Second, pursuant to procedures and a timeline developed by a Commission and NERC staff Information Sharing Working Group, Commission and NERC staff would develop NERC-managed tools for Commission access to anonymized TADS, GADS, and protection system misoperations databases. This Information Sharing Working Group would be established within 90 days of the Commission's order on the NOPR, to identify and structure Commission access to necessary data pursuant to Rule 39.2(d) of the Commission's regulations.³⁰ The Information Sharing Working Group would be accountable to senior management at both the Commission and NERC and to the NERC Board of Trustees. This two-phased approach would provide an enduring path forward to ensure Commission access to data necessary to evaluate the need for the Commission to direct new or modified Reliability Standards and better understand NERC periodic assessments and reports.

NERC's Proposed Alternative should achieve Commission access to data sought in the NOPR, while providing additional opportunity for the Information Sharing Working Group to identify and structure Commission access to necessary data in the future in a coordinated and constructive manner. The anonymized raw data which would be provided under the first phase of NERC's Proposed Alternative would provide more detail on each individual outage than the

³⁰ 18 C.F.R. §39.2(d) (stating, "Each user, owner or operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement section 215 of the Federal Power Act as determined by the Commission and set out in the Rules of the Electric Reliability Organization and each applicable Regional Entity. The Electric Reliability Organization and each Regional Entity shall provide the Commission such information as is necessary to implement section 215 of the Federal Power Act.").

aggregated rolled-up data that NERC offered Commission staff on October 22, 2014 in response to a data request for 2013 data to support Commission staff's calculation of a Commission performance measure regarding non-weather related transmission-related events in the Commission's 2014-2018 Strategic Plan.³¹ NERC welcomes the opportunity to continue discussions regarding data and information sharing to ensure that the Commission has data necessary for its statutory oversight over Reliability Standards.

Through the second phase of NERC's Proposed Alternative, the Information Sharing Working Group would develop data interfaces that would provide Commission access to information necessary to support its statutory obligations while navigating the types of challenges presented by the Proposed Rule. As part of the Information Sharing Working Group, for example, NERC would collaborate with Commission staff to identify and develop additional NERC-managed tools for TADS and protection system misoperations data that replicate the opportunities presented by systems like pc-GAR, such as opportunities to download and analyze anonymized data. This data would be appropriate for statistics and metric formation, enabling the comparison of regional and sub-regional values to overall averages, developed by cause codes and associated information. Collaboratively, Commission and NERC staff could expand on expected analysis to achieve valuable information for purposes of identifying potential reliability issues and the impacts of mitigating measures. Further, the Information Sharing Working Group would provide the Commission and its staff the opportunity to request necessary data and trend analysis from NERC. This would enhance Commission and ERO Enterprise

³¹ See, Access to NERC TADS, GADS, and Misoperations Data, FERC Accession No. 20140903-3032, at p. 2 and n. 3 (Sept. 3, 2014) (referencing the Commission's 2014-2018 Strategic Plan, Performance Measure 3 and reflecting that the request referenced an intent to utilize the 2013 data to help analyze the amount of lost megawatts in a given year resulting from BPS transmission-related events (unplanned disturbances), excluding weather-related outages).

efforts under section 215 of the FPA. The Commission has previously used similar means to facilitate Commission-ERO collaboration under section 215 of the FPA. Recently, for example, the Commission directed that Commission staff work with ERO staff to develop revised success factors and data-driven metrics for NERC's Reliability Assurance Initiative.³²

A significant advantage of NERC's Proposed Alternative is that it would similarly build on existing Commission-ERO collaboration in a manner that supports data-informed dialogue integral to effective implementation of the Congressional model for reliability of the BPS. In particular, NERC's Proposed Alternative would provide a structured means for further Commission-ERO coordination regarding necessary data and analytics. This would be a natural next step in the Commission's ongoing oversight of ERO initiatives. The Commission currently exercises oversight regarding ERO initiatives on a variety of fronts. For example, the Commission (i) regularly provides input to standards drafting teams and NERC committees,³³ (ii) has issued hundreds of directives regarding filed Reliability Standards, (iii) has directed development of Reliability Standards to address physical security risks and risks associated with geomagnetic disturbances, and (iv) has held a reliability technical conference over the past several years to discuss trends regarding reliability. Moreover, NERC has disclosed data to Commission staff pursuant to data requests and through regular coordination on reliability of the grid, including timely updates from significant event analysis activities. NERC's *Five-Year ERO Performance Assessment Report* described examples of regular NERC information sharing with the Commission, such as the manner in which NERC's Bulk Power System Awareness

³² *North American Electric Reliability Corp.*, 153 FERC ¶ 61,130, at P 33 (2015).

³³ Commission staff members provide input to the NERC Compliance and Certification Committee, Member Representatives Committee (as a non-voting member), Operating Committee, and Planning Committee, and all Reliability Standard drafting projects under development.

department shares its continuous assessment regarding the status of the BPS from a near-term operational reliability perspective “across NERC, the eight Regional Entities and FERC staff through a number of channels, including a System Awareness Daily Report....”³⁴ Thus, Commission and NERC staff coordinate daily on a variety of initiatives that support reliability. The partnership on information sharing included under NERC’s Proposed Alternative would allow for continued communication between the Commission and ERO.

B. NERC’s Proposed Alternative Would Support the NOPR through an Approach Consistent with the Framework for Reliability Established by Congress.

1. The Statutory Institutional Framework for Reliability in EPAct 2005 Centralized Resources within a Commission-Certified ERO.

An agency “must give effect to the unambiguously expressed intent of Congress.”³⁵

Through EPAct 2005, Congress strengthened the institutional framework for reliability of the North American BPS by adding section 215 of the FPA (Section 1211(a) of EPAct 2005)³⁶ and clarifying that the ERO and Regional Entities are not instrumentalities of the U.S. Government (Section 1211(b) of EPAct 2005).³⁷ The hallmark of this statutory model is its allocation of distinct responsibilities for actions necessary to achieve reliability of the BPS to the Commission and a Commission-certified ERO. No other area of the FPA relies upon such a bifurcation of responsibilities between a federal agency and non-governmental organization. Section 215 of

³⁴ *Five-Year Performance Assessment Report*, at p. 72.

³⁵ *See, Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, at 842-843 (1984). *See also, Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, at 2166-2167 (2012); *Office of Consumers’ Counsel v. FERC*, 655 F.2d 1132, at 1149 (D.C. Cir. 1980) (“it is axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute.”); *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, at 617 (D.C. Cir. 1976); and *Real v. Simon*, 510 F.2d 557, at 564 (5th Cir. 1975); *Electric Power Supply Ass’n v. FERC*, 753 F.3d 216, at 220 (D.C. Cir. 2014).

³⁶ 16 U.S.C. §824o.

³⁷ Section 1211(b) of EPAct 2005 (stating, “[t]he Electric Reliability Organization...and any regional entity delegated enforcement authority...are not departments, agencies, or instrumentalities of the United States Government.”). Section 1211(c) of EPAct 2005 related to access approvals by federal agencies.

the FPA, therefore, recognizes the extensive collaboration that is continually required with a diverse array of stakeholders in order to accomplish enhanced reliability of the grid.

Specifically, Congress entrusted the Commission with (i) certifying the ERO responsible for establishing and enforcing Reliability Standards for the BPS in the U.S., subject to Commission review, and (ii) approving and enforcing such Reliability Standards.³⁸ Congress entrusted the ERO with (i) establishing and enforcing Reliability Standards for the BPS, and (ii) conducting periodic assessments for reliability and adequacy of the BPS.³⁹ The ERO must consider facts affecting reliability across the entire North American BPS (including Canada and Mexico) when developing Reliability Standards and assessing the grid. Recognizing the Commission’s oversight role and the technical expertise expected of the ERO, Congress stated that “[t]he Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a Reliability Standard....”⁴⁰ Therefore, section 215 of the FPA tackles the challenges presented in ensuring reliability across the North American BPS by utilizing a framework that centralizes responsibility for day-to-day activities for reliability of the grid within a Commission-certified ERO and that helps avoid potential misperceptions that collaborating to improve reliability will adversely affect stakeholder interests.

In Order No. 672, the Commission issued regulations implementing section 215 of the FPA, consistent with this model.⁴¹ The Commission explained that, “Congress created the

³⁸ 16 U.S.C. §824o(c) and (b).

³⁹ 16 U.S.C. §824o(a)(2) and (g).

⁴⁰ 16 U.S.C. §824o(d)(2).

⁴¹ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

concept of ERO and Regional Entities to be special purpose entities responsible for the Bulk-Power System and subject to Commission jurisdiction and oversight.”⁴² The Commission’s ERO regulations accordingly included, for example, provisions:

- (i) For certification of an ERO;⁴³
- (ii) Explaining that Commission jurisdiction under section 215 of the FPA applies “for the purposes of approving Reliability Standards ... and enforcing compliance...[;]”⁴⁴
- (iii) Explaining that the ERO establishes and enforces Reliability Standards for the BPS, subject to Commission review, with due weight accorded to the ERO’s technical expertise;⁴⁵
- (iv) Establishing Rule 39.2(d), requiring ERO and Commission access to “information as is necessary to implement section 215[;]”⁴⁶ and
- (v) Reflecting the ERO’s obligation to prepare reliability and adequacy assessments.⁴⁷

Order No. 672 acknowledged the importance of trust in facilitating adequate information sharing by emphasizing that it would be necessary for the ERO Enterprise to “adopt confidentiality Rules to prevent the unintended disclosure of such information.”⁴⁸

Order No. 672 also clarified the Commission’s expectations regarding ERO reliability and adequacy assessments. Neither section 215 of the FPA nor the Commission’s ERO regulations require Commission approval or acceptance of NERC assessments of the BPS. Rather the statute states that “[t]he ERO shall conduct periodic assessments...” and regulation only requires the ERO to report, rather than seek approval of, its findings to the Commission.⁴⁹ Consistent with the Commission’s statutory oversight role, Order No. 672 explained that, “the Commission expects each assessment to be comprehensive in order for the Commission, the

⁴² Order No. 672, at P 867.

⁴³ 18 C.F.R. §39.3.

⁴⁴ 18 C.F.R. §39.2.

⁴⁵ 18 C.F.R. §39.1 and 39.5.

⁴⁶ 18 C.F.R. §39.2(d).

⁴⁷ 18 C.F.R. §39.11.

⁴⁸ Order No. 672, at P 115.

⁴⁹ *See*, 16 U.S.C. §824o(g); *and* 18 C.F.R. §39.11.

ERO, and the Regional Entities to fulfill their respective oversight responsibilities.”⁵⁰

Recognizing the ERO’s central role in focusing resources to achieve reliability, the Commission later added, “[t]he ERO is in a unique position to obtain and analyze information regarding resource adequacy across all regions of the Bulk-Power System in interconnected North America.”⁵¹

Subsequent to Order No. 672, the Commission certified NERC as the ERO and approved the NERC Rules of Procedure, subject to further compliance filing.⁵² The Certification Order stated, “[t]he Commission continues to believe that a strong ERO is necessary to promote excellence in the development and enforcement of mandatory Reliability Standards, as envisioned in Order No. 672.”⁵³ As directed in Order No. 672, Section 1500 of the Commission-approved NERC Rules of Procedure included rules regarding confidentiality and disclosure of information submitted to the ERO Enterprise. Rule 1505 clarified application of these procedures to Commission requests for Confidential Information.⁵⁴

Thereafter, NERC enhanced its Rules of Procedure to reflect Section 1600 regarding NERC requests for data to facilitate execution of the ERO’s statutory functions.⁵⁵ With regard to confidentiality, Rule 1605 provided that if a Section 1600 data request includes a statement confirming confidential treatment for requested data, then Section 1500 of the NERC Rules of

⁵⁰ Order No. 672, at P 805.

⁵¹ Order No. 672, at P 806.

⁵² *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (“Certification Order”), *order on reh’g and compliance*, 117 FERC ¶ 61,126 (2006), *aff’d sub nom. Alcoa, Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

⁵³ Certification Order, at P 4.

⁵⁴ NERC Rules of Procedure, at Rule 1505 (stating, “A request from FERC for reliability information with respect to owners, operators, and users of the Bulk Power System within the United States is authorized by Section 215 of the Federal Power Act. ... Unless otherwise directed ... upon receiving such a request, a Receiving Entity shall provide contemporaneous notice to the applicable Submitting Entity. In its response to such a request, a Receiving Entity shall preserve any mark of confidentiality and shall notify FERC”).

⁵⁵ *North American Electric Reliability Corp.*, 122 FERC ¶ 61,142 (2008) (“Section 1600 Order”).

Procedure applies without further action. The Commission approved Section 1600 of the NERC Rules of Procedure, subject to Commission notification of Section 1600 data requests prior to their public posting. Reflecting the Commission’s statutory oversight role and the ERO’s role in executing day-to-day activities to ensure reliability of the BPS, the Commission explained that, “[t]his notification of proposed requests is for informational purposes.”⁵⁶

Thus, for the past decade since EAct 2005, the Commission has consistently implemented the statutory institutional framework for reliability of the BPS created under section 215 of the FPA to centralize responsibility for day-to-day activities for reliability of the North American-wide BPS within the Commission-certified ERO. The reduction in non-weather initiated transmission-related events, average transmission outage severity, declared Energy Emergency Alert Level 3 Events, and protection system misoperations demonstrate how this unique, collaborative, statutory framework is improving reliability of the BPS.⁵⁷

2. NERC’s Proposed Alternative Would Manage Complexities Associated with Reliability Issues and Data, Consistent with Congressional Intent.

The Proposed Rule would operate in tension with section 215 of the FPA, to the extent that it is intended to facilitate Commission staff development of Reliability Standards and preparation of reliability and adequacy reports, rather than supporting the Commission’s oversight role.⁵⁸ Such a duplication of efforts would be inconsistent with the statutory model designed by EAct 2005 and the Congressional directive that the Commission accord due weight

⁵⁶ Section 1600 Order, at P 19.

⁵⁷ *Five-Year ERO Performance Assessment Report*, at p. 2; and *State of Reliability 2015 Report*, at pp. 8-11.

⁵⁸ NOPR, at P 18 (asserting that, “with respect to the development of new Reliability Standards or modification of existing Reliability Standards, section 215(d) of the FPA tasks both the Commission and the ERO (i.e., NERC) with the responsibility to monitor reliability trends or reliability gaps that might warrant the development or modification of a Reliability Standard.”); *and id.*, at PP 18 and 20 (stating that the Proposed Rule will help inform the Commission “more quickly, directly and comprehensively about reliability trends or reliability gaps...” and “monitor causes of outages and detect emerging reliability issues.”).

to the ERO's technical expertise.⁵⁹ It would also be inconsistent with Commission orders implementing section 215 of the FPA and statements regarding a strong and independent ERO.⁶⁰

In addition, the scope of the Proposed Rule creates practical challenges impeding efforts to improve reliability of the BPS. The Proposed Rule is not tailored to support the Commission's objective under the NOPR, because it will not enable the Commission to place relevant data in context for purposes of completing meaningful analyses of the BPS in support of Commission oversight regarding the need for new or modified Reliability Standards or its understanding of NERC reliability and adequacy assessments.

In establishing the statutory institutional framework for reliability at section 215 of the FPA, Congress recognized that (i) broad stakeholder collaboration and industry working groups are critical to understanding reliability data and developing Reliability Standards, and (ii) that an independent ERO would be necessary to marshal those resources. As explained in Order No. 672, for example, the Commission stated that identifying meaningful formats for Commission access to reliability-related data necessitates careful coordination and examination of complexities associated with the information.⁶¹

Consistent with Congressional intent, the NERC applies a multitude of stakeholder working group, committee, subject matter experts, and standards development drafting team efforts to achieve meaningful data analysis and results for enhanced reliability of the grid across North America. For example, NERC's *State of Reliability 2015* report reflects the confluence of efforts by (i) ERO Enterprise staff, (ii) the Performance Analysis Subcommittee, (iii) BES Security Metrics Working Group, (iv) Critical Infrastructure Protection Committee, (v) Planning

⁵⁹ *Supra*, Section IV.B.1.

⁶⁰ *Id.*

⁶¹ Order No. 672, at P 116.

Committee, (vi) Operating Committee, (vii) Essential Reliability Services Task Force, (viii) Resources Subcommittee, and (ix) other committees and working groups highlighted in the report and supported by industry participation.⁶² The *State of Reliability 2015* report emphasized that “continued cooperation and collaboration with the industry is the hallmark to [the Event Analysis Process] success.”⁶³

As reflected by the *State of Reliability 2015* report, NERC’s event analysis team operates a sophisticated metrics group reviewing trends and lessons learned in order to support reliability. NERC’s *Five-Year ERO Performance Assessment* further explained that NERC draws upon a plethora of resources and applies performance analysis, solid technical foundation, sophisticated statistical analyses, and integrated validation with actual system events to enhance BPS reliability.⁶⁴ As detailed in that same filing, NERC also continuously works with the Regional Entities, North American Transmission Forum, and North American Generator Forum to obtain and review information regarding qualifying events and disturbances to identify risks and trends.⁶⁵ Commission staff is often an integral participant in these activities, as discussed in Section IV.A. above, which helps ensure that the Commission has real-time insight into ERO initiatives and reliability. The Proposed Rule does not include the same opportunities for coordination and collaboration provided by NERC’s Alternative Proposal. However, without the collaborative process implemented by NERC pursuant to its statutory obligations as the North American ERO, the Commission would not be able to place relevant data in context to derive useful information, which may result in incorrect or inappropriate conclusions.

⁶² See e.g., *State of Reliability 2015 Report*, at pp. 7, 32, and 78 and Appendix H, at pp. 153-155.

⁶³ *State of Reliability 2015 Report*, Appendix E, at p. 148.

⁶⁴ *Five-Year ERO Performance Assessment Report*, at p. 61.

⁶⁵ *Id.*, at pp. 68-69.

To address the statutory and technical challenges presented by the Proposed Rule, NERC's Proposed Alternative would leverage the unique regulatory construct created by Congress to manage complexities associated with reliability. In particular, under NERC's Proposed Alternative, NERC would provide Commission and its staff with anonymized versions of TADS, GADS, and protection system misoperations data under procedures and a timeline established by a Commission and NERC staff Information Sharing Working Group. In addition, the Information Sharing Working Group would provide for continued discussion between Commission and NERC staff to identify and structure Commission access to necessary data.

One of the key strengths of the statutory institutional framework for reliability created in EAct 2005 is its utilization of the ERO Enterprise to leverage international industry expertise, backed by a strong analytical capability, to support the identification and mitigation of reliability risks. Implementation of this collaborative framework, in coordination with industry and appropriate Commission oversight, has enhanced the reliability of the BPS with excellent results, discussed in NERC's *Five-Year ERO Performance Assessment* and *State of Reliability 2015* report.⁶⁶ NERC's Proposed Alternative would ensure that the Commission has accurate information necessary to complete analysis and reasoned decision-making for oversight purposes, by capitalizing on the work completed by the ERO Enterprise to address the complexities presented by the implicated data.

C. NERC's Proposed Alternative Would Address Concerns Regarding Confidentiality.

The Proposed Rule could blur the distinction between the Commission and ERO by treating ERO-held data as Commission data, contrary to Congressional clarification that the ERO is not an instrumentality of the state. This would create unnecessary data vulnerability and risk

⁶⁶ *Supra*, Section I.

to confidentiality. In contrast, NERC’s Proposed Alternative would provide the Commission with access to information necessary to fulfill its responsibilities under section 215 of the FPA, while managing issues associated with confidentiality by maintaining the distinction between the Commission and ERO and providing for anonymized data.

1. The Statutory Institutional Framework for Reliability of the BPS Protects Data Submitted to NERC from Undue Risks to Confidentiality.

In EPOA 2005, Congress expressly clarified that the ERO and its Regional Entities “are not departments, agencies, or instrumentalities of the United States Government.”⁶⁷ Further, NERC is not federally funded, federally chartered, or subject to day-to-day government control.⁶⁸ Therefore, information submitted to NERC is not an agency record, and NERC data requests do not fall within the Paperwork Reduction Act (“PRA”) or the Freedom of Information Act (“FOIA”).⁶⁹ In contrast, FOIA requires agencies, such as FERC, to disclose agency records⁷⁰ as requested by “any person” under FOIA procedures unless an exemption applies.⁷¹

Recognizing the importance of information sharing and industry participation to an effective ERO, the Commission has repeatedly emphasized the confidentiality of NERC-held data. As discussed in Section IV.B. above, in issuing Rule 39.2(d), Order No. 672 acknowledged

⁶⁷ EPOA 2005, at Section 1211(b).

⁶⁸ See, e.g., 18 C.F.R. Part 39; and 16 U.S.C. §824o.

⁶⁹ 44 U.S.C. §§3501-3521; and 5 U.S.C. §552.

⁷⁰ Agency record includes records that are (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, at 144-45 (1989). The D.C. Circuit has established a four-part test to examine whether a record is subject to FOIA: “The Supreme Court has held that FOIA reaches only records the agency controls at the time of the request. . . . Control means ‘the materials have come into the agency’s possession in the legitimate conduct of its official duties.’ We look to four factors to determine whether an agency controls a document: (1) the intent of the document’s creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record system or files.” *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, at 926-927 (internal citations omitted).

⁷¹ 5 U.S.C. §552; and 18 C.F.R. Part 388. See also, *Freedom of Information Act – Memorandum*, 74 Fed. Reg. 4683 (Jan. 21, 2009) (reflecting a 2009 Presidential Memorandum directing agencies to apply a “presumption in favor of disclosure”).

that the ERO and Regional Entities should “adopt confidentiality Rules to prevent the unintended disclosure of such information.”⁷² The NERC Rules of Procedure incorporate such rules, and the Commission has frequently reiterated NERC’s obligation to protect sensitive or Confidential Information. For example, in approving Section 1600 of the NERC Rules of Procedure, the Commission indicated that data requests should not create data vulnerability under FOIA. In response to concerns raised by Bonneville Power Authority that disclosure to NERC could risk waiver of FOIA exemptions, the Commission stated:

[w]ith respect to proposed section 1605, we find that NERC has appropriately balanced its need for full and candid disclosure of data and information with the responding parties’ needs to maintain the confidentiality of certain data and information. In response to Bonneville, however, we agree that a governmental entity subject to FOIA should not be required to submit sensitive information that could be deemed a waiver of a FOIA exemption that is otherwise available....⁷³

The Commission also recently acknowledged that confidential treatment for the detailed level of sensitive data submitted to NERC supports national security. Order No. 802, explained that:

the Commission recognized that compliance with the contemplated physical security Reliability Standards would likely require the development or sharing of confidential or sensitive material that, if disclosed to the public, could jeopardize the reliable operation of the Bulk-Power System. As a result, the Commission directed NERC to include adequate procedures in the Reliability Standards to prevent the dissemination of confidential or sensitive information.⁷⁴

Further clarifying that sharing data with NERC should not create data vulnerability under FOIA, the Commission added in June 2015:

.... the information collected as related to the CIP Reliability Standards is generally protected from FOIA requests because it is retained by the regulated

⁷² Order No. 672, at P 115.

⁷³ Section 1600 Order, at P 18.

⁷⁴ Order No. 802, at P 106. In approving the resulting Reliability Standard CIP-014-1, the Commission similarly stated that in the informational filing on protection of “High Impact” control centers under the standard, the “Commission expects NERC to prepare the informational filing and submit it in such a way as to protect any critical information from public disclosure.” *See*, Order No. 802, at P 58.

entities themselves and not the Commission.... The Commission, ..., reviews and approves enforcement actions undertaken by ERO and, in doing so, does receive information collected related to CIP Reliability Standards. However, the information that is received by the Commission for performing its statutory oversight responsibilities is generally devoid of specific sensitive information. Therefore, FERC does not find it necessary to make any changes to the collection at this time.⁷⁵

These statements clarify that (i) the Commission’s PRA submissions apply to Commission collection of Reliability Standards information for purposes of statutory oversight activities, and (ii) that the Commission’s statutory oversight role means that it does not generally collect sensitive information.

Thus, both through directives to NERC and clarifications regarding the level of data collected by the Commission, Commission action has supported confidentiality and protection of sensitive registered entity information submitted to NERC, consistent with Congressional clarification that NERC is not an instrumentality of the U.S. Government. This has played a pivotal role in facilitating ERO development of the trust and dialogue necessary with stakeholders across North America to ensure reliability of the BPS.

2. NERC’s Proposed Alternative Would Avoid Undue Risk to Confidentiality.

The Proposed Rule would create undue vulnerability under FOIA, by making identifying and attributable data available to the Commission for its download and use, and thereby potentially agency records subject to FOIA.⁷⁶ In particular, the Proposed Rule would require that the ERO “make available to the Commission, on a non-public and ongoing basis, access to the Transmission Availability Data System, Generating Availability Data System, and protection system misoperations databases, or any successor databases thereto.” The NOPR indicates the

⁷⁵ *Commission Information Collection Activities (FERC-725B); Comment Request*, Docket No. IC15-6-000, (June 19, 2015).

⁷⁶ *See supra*, n. 70.

Proposed Rule intends to provide Commission staff access to data, as if the Commission collected it, with further Commission staff ability to download data and perform data analytics for various purposes that would duplicate the ERO efforts.⁷⁷ This would operate in tension with section 215 of the FPA and the clarification in EAct 2005 that NERC is not an instrumentality of the Commission.⁷⁸ The Proposed Rule would also be inconsistent with the Commission’s statement that “the information that is received by the Commission for performing its statutory oversight responsibilities is generally devoid of specific sensitive information....”⁷⁹

Risk of Commission disclosure of the implicated data under FOIA would impair NERC and the Commission’s ability to obtain necessary reliability related information in the future, as discussed in Section IV.E.⁸⁰ While NERC believes that data implicated by the NOPR would normally be eligible for exemption from FOIA disclosure as commercial information or sensitive information in light of security interests,⁸¹ and protected as Confidential Information or CEII under Commission regulation,⁸² eligibility for exemption from disclosure under FOIA only

⁷⁷ See e.g., NOPR, at P 15 (reflecting intent to view and download data) and P 18. The Proposed Rule does not clarify potential uses of accessed data, which may create challenges as the data was collected with a focus on reliability and inappropriate results may arise, if the information is inadvertently applied out of context. See *supra*, Section IV.B. discussing challenges associated with scope.

⁷⁸ Cf., Section 1211(b) of EAct 2005

⁷⁹ *Commission Information Collection Activities (FERC-725B); Comment Request*, Docket No. IC15-6-000 (June 19, 2015).

⁸⁰ *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, at 879 (D.C. Cir. 1992) (en banc).

⁸¹ 5 U.S.C. §552(b). Consistent with Rule 1605 of the Commission-approved NERC Rules of Procedure, each data request for the TADS, GADS, and protection system misoperations data reflects confidential treatment for identifying submitting data. The data could also be deemed commercial or financial information under FOIA exemption 4, as “the provider of the information has a commercial interest in the information submitted.” *Baker & Hostetler LLP v. U.S. Dept. of Commerce*, 473 F.3d 312 (D.C. Cir. 2006). See also, *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, at 880 (D.C. Cir. 1992) (en banc).

⁸² See e.g., *Critical Energy Infrastructure Information*, Order No. 630, 68 Fed. Reg. 9,857, at 9,859 (2003); and *Critical Energy Infrastructure Information*, 67 Fed. Reg. 57,994, at n. 9 (Sept. 13, 2002) (noting in the notice of proposed rulemaking and revised statement of policy, that the FOIA exemption for records authorized to be kept secret in the interest of national defense might potentially also apply to CEII).

partially mitigates risk to confidentiality. In particular, while FOIA exemptions provide an agency with discretion to refrain from disclosure, they do not prohibit disclosure.

The Commission has disclosed information eligible for exemption from FOIA, including CEII. Recently, for example, the Commission rejected the Midcontinent Independent System Operator, Inc.'s request for privileged treatment for certain customer-specific information, for failure to satisfy FOIA Exemption 4 for commercially sensitive information.⁸³ In addition, in 2007, the Commission granted multiple requests for disclosure of CEII submitted by NERC member entities (including certain Regional Entities), despite determinations that the requested information was CEII and eligible for exemption from disclosure under FOIA. The Commission stated, “[a]lthough the information requested is CEII, it may be released to requesters with a legitimate need for the information.”⁸⁴ In addition, the Commission has stated that while voluntary submission of information may be relevant in deciding whether to withhold information based on a FOIA exemption, it “is not required, however, to withhold information that is voluntarily submitted.”⁸⁵

Thus, the Proposed Rule would create undue and unwarranted risk to confidentiality. As discussed in Section IV.A., NERC regularly shares information with the Commission and the Commission plays an active role in NERC initiatives. For example, the Commission has issued two directives requiring NERC development of Reliability Standards, hundreds of directives

⁸³ *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,158 (2014); *order on clarification, reh’g, and compliance filings*, 153 FERC ¶ 60,016 (2015).

⁸⁴ *See, Scott Deffenderfer, et. al.*, 120 FERC ¶ 62,020, at P 8 (2007); *and id.*, at P 11 (adding, “Notwithstanding the fact that this information is CEII and could be harmful in the wrong hands, I conclude that release to these requesters, in accordance with the terms of the attached non-disclosure agreements, is appropriate.....”) (the request had sought a copy of NERC’s Multiregional Modeling Working Group power flow models, as well as transmission maps and system or substation diagrams that showed electrical connectivity). *See also, Michael J. Schubiger*, 120 FERC ¶ 62,131 (2007); *Sunil Talati*, 120 FERC ¶ 62,113 (2007); *Edward J. Park*, 120 FERC ¶ 62,061 (2007); *and Hala Ballouz*, 119 FERC ¶ 62,204 (2007).

⁸⁵ *Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, et al.*, 102 FERC ¶ 61,311, at P 12 (Mar. 21, 2003).

regarding filed Reliability Standards, and provided input for standard drafting teams and numerous other NERC programs. This record demonstrates that the Proposed Rule is not required for Commission access to necessary data. Further, as discussed in Section IV.E. below, data vulnerability caused by the Proposed Rule would likely significantly chill voluntary information sharing by industry and materially hamper the international trust in operation of section 215 of the FPA that the Commission's prior statements regarding confidentiality helped foster. Therefore, the Proposed Rule would create significant risk to confidentiality, conflicting with statute, regulations, and precedent, for indeterminate or negative benefit, contrary to reasoned decision-making.⁸⁶

NERC's Proposed Alternative would balance the importance of confidentiality in facilitating information sharing and effective implementation of section 215 of the FPA, with Commission access to necessary data. In particular, NERC's Proposed Alternative would provide the Commission with anonymized versions of TADS, GADS, and misoperations databases, providing detailed information supporting Commission oversight, while avoiding disclosure of identifying or attributable data. This approach relies on Chairman Bay's suggestion during the 2015 Reliability Technical Conference that there might be a way to mask data to facilitate analysis "that essentially looked at the data as a whole..." and thereby mitigate confidentiality concerns.⁸⁷

ERO regulation and the NERC Rules of Procedure permit such disclosure, subject to applicable protections for confidentiality under Section 1500 of the NERC Rules of Procedure

⁸⁶ See, *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, at 968 (D.C. Cir. 2005) (Commission must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, at 43 and 54-57 (1983)).

⁸⁷ 2015 Transcript, at p. 44 (June 4, 2015).

and Commission regulation. As noted above, the data requests for TADS, GADS, and protection system misoperations data clarify that, notwithstanding protection for identifying Confidential Information, NERC may disclose anonymized data.⁸⁸ NERC has successfully relied upon this authority in the past and could rely on this authority to continue to provide information appropriate for supporting statistics and metric formation, suitable for the comparison of regional and sub-regional values to overall averages.

D. NERC’s Proposed Alternative Would Leverage Existing Regulation and Build on Current Success.

The Proposed Rule is not necessary to support the Commission’s objective and would reflect unwarranted duplicative and ambiguous regulation.⁸⁹ As the NOPR acknowledged, “Section 39.2(d) of the Commission’s regulations requires NERC and each Regional Entity to ‘provide the Commission such information as is necessary to implement section 215 of the Federal Power Act.’”⁹⁰ As a result, unless the NOPR intends to use the Proposed Rule to mandate Commission access to data beyond information necessary to implement section 215 of the FPA, the Proposed Rule is unnecessarily duplicative and unduly ambiguous by instituting a parallel regime for data access with undefined procedures and infinite breadth. For example, Rule 39.2(d) expressly clarifies that the regulation applies to data regarding facilities in the U.S., whereas the Proposed Rule does not.⁹¹ In addition, the Commission-approved NERC Rules of Procedure impose due process requirements upon requests for Confidential Information, whereas the Proposed Rule does not.⁹² It would be unjust, unreasonable, and against the public interest to impose such unnecessarily duplicative and ambiguous regulation.

⁸⁸ *Supra*, Section IV.B.1.

⁸⁹ *Supra*, n. 86.

⁹⁰ NOPR, at P 16. *See also*, 18 C.F.R. §39.2(d).

⁹¹ *Cf.*, 18 C.F.R. §39.2; *and* Proposed Rule.

⁹² *Cf.*, NERC Rules of Procedure, at Rule 1505; *and* Proposed Rule.

In contrast, NERC's Proposed Alternative would be immediately available under Rule 39.2(d), leverage current collaboration between Commission and ERO staff, and avoid duplicative regulation. Specifically, NERC's proposal that NERC provide the Commission with anonymized versions of TADS, GADS, and protection system misoperations data would qualify as a Rule 39.2(d) data request. The Commission has successfully issued data requests to NERC pursuant to such authority.⁹³ Moreover, Rule 39.2(d) reflects the Commission's jurisdictional limitation and would thereby ensure that the data request only mandates disclosure of U.S. information. Further, the directive would qualify as a Commission request for Confidential Information pursuant to Rule 1505 of the NERC Rules of Procedure, and avoid ambiguity regarding continued effectiveness of that process or other Commission-approved rules and regulations. Finally, through the Information Sharing Working Group, Commission and ERO staff would not only develop procedures and timing for Commission access to anonymized versions of the databases, but also have the opportunity to collaborate regularly to identify and structure Commission access to necessary data, consistent with Rule 39.2(d), the NERC Rules of Procedure, and applicable regulation.

E. NERC's Proposed Alternative Would Avoid Unintended Consequences that Would Increase Risks to Reliability.

The Proposed Rule would create unintended consequences that would prevent effective operation of the statutory institutional framework for reliability of the BPS and thereby increase risks to reliability. In particular, the undue risk to confidentiality and data vulnerability discussed in Section IV.C. would likely chill information and expertise shared with the ERO Enterprise. During the 2015 Reliability Technical Conference, Commissioner LaFleur

⁹³ *Supra*, Section IV.A.

acknowledged that data vulnerability could affect efforts to ensure that necessary information is in the right hands.⁹⁴ Such a chilling effect would reduce the level of information available in connection with TADS, GADS, and protection system misoperations, and reduce industry participation in NERC programs at a more general level, adversely affecting NERC’s risk-based assessments and development of Reliability Standards.

Moreover, the Proposed Rule could discourage participation of non-U.S. entities in information sharing and reduce confidence in the institutional framework for reliability based on the Proposed Rule’s tension with section 215 of the FPA. As noted during the 2015 Reliability Technical Conference, Canadian entities may feel that, “[r]eporting from a Canadian entity to an international organization like NERC is one thing. Reporting the same day to the DOE or to someone else may be more problematic”⁹⁵

Reduced participation in ERO activities would lead to less comprehensive understanding regarding reliability and adequacy of the BPS across North America and the need for new or modified Reliability Standards. This could impose unjust and unreasonable costs, contrary to the public interest,⁹⁶ and would be counterproductive to both section 215 of the FPA and the NOPR. The Commission provides no justification for such increased risk to reliability of the BPS or the statutory institutional framework for reliability.⁹⁷ Nor has the Commission stated that it lacks capability to assess filed Reliability Standards or NERC reliability and adequacy assessments. Furthermore, Commission oversight of ERO initiatives, discussed in Section IV.A., demonstrates that the Commission has consistently maintained access to data necessary for implementation of

⁹⁴ 2015 Transcript, at pp. 218 and 221 (June 4, 2015).

⁹⁵ *Id.*, at p. 217.

⁹⁶ *Cf.*, NOPR, at P 26. Other costs would include the ERO’s activities to separate non-mandatory and non-U.S. data from U.S. data.

⁹⁷ *Supra*, n. 86.

section 215 of the FPA, notwithstanding NERC's appreciation for this opportunity to investigate improvements to collaboration and coordination regarding reliability of the BPS.

As emphasized during the 2015 Reliability Technical Conference, NERC has expended significant effort to build industry trust and confidence, to facilitate industry sharing a wealth of data that enables NERC to act as a confident and effective ERO.⁹⁸ Such efforts and increased information sharing have materially improved reliability of the BPS.⁹⁹ NERC is concerned that the Proposed Rule would undercut these efforts and return both NERC and the Commission to a state where industry only shares reliability-related data in response to mandatory data requests that provide a narrow window into the web of complex information necessary to ensure reliability.¹⁰⁰ Registered entities may cease sharing detailed, voluntary information with the ERO Enterprise, and only disclose certain information to voluntary organizations similar to practices predating EAct 2005, resulting in an incomplete picture of the BPS. This decentralization of activities to ensure reliability would contravene the Congressional intent of EAct 2005 and undermine the past decade's success in achieving a more reliable BPS.

NERC's Proposed Alternative would avoid such unintended consequences. Specifically, NERC's Proposed Alternative would provide the Commission with anonymized versions of TADS, GADS, and protection system misoperations data. NERC's two-phased approach to share such anonymized data would support the Commission's objective, in a manner that enables NERC and the Commission to identify and structure Commission access to necessary data, manages confidentiality, and applies existing regulation.

⁹⁸ 2015 Transcript, at p. 43 (June 4, 2015).

⁹⁹ *See, supra*, Section I.

¹⁰⁰ *Id.*, at p. 45.

V. CONCLUSION

For the reasons stated above, NERC requests that the Commission not issue the Proposed Rule, and, instead, accept NERC's Proposed Alternative to provide the Commission with anonymized versions of TADS, GADS, and protection system misoperations data.¹⁰¹ As demonstrated above, NERC's Proposed Alternative would support the NOPR, in a manner that leverages the opportunities provided by the statutory institutional framework for reliability within section 215 of the FPA and avoids the unintended consequences that would arise under the Proposed Rule. As a result, the Commission should adopt NERC's Proposed Alternative as just, reasonable, and in the public interest.

Respectfully submitted,

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¹⁰¹ NERC's proposal reflects a clarification that the Commission does not seek non-U.S. data, as it relies on Rule 39.2(d).

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service lists compiled by the Secretary in Docket No. RM15-25-000.

Dated at Washington, DC this 15th day of December, 2015.

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