Board of Trustees Compliance Committee
Decision on Emergency Request for Removal from Compliance Registry
(Issued October 10, 2007)

Issue
On October 2, 2007, New Harquahala Generating Company, LLC (Harquahala) filed an appeal of its inclusion on the NERC Compliance Registry within the Western Electricity Coordinating Council (WECC) for the function of transmission owner (TO) and transmission operator (TOP). In addition, Harquahala filed an Emergency Request for Removal from the Compliance Registry. Harquahala owns, among other things, a 26-mile 500 kV line that connects Harquahala’s generation facility to the transmission grid. This decision addresses only Harquahala’s “emergency” request.

Harquahala states, in part, that the request for removal should be granted given that (1) NERC is treating Harquahala as a “test case;” (2) there is “uncertainty within WECC and among the regions regarding whether and how to register generators with interconnection facilities;” (3) the “immediate exposure to significant financial costs or penalties;” and (4) “Harquahala’s noncompliance with the TO/TOP Reliability Standards should not cause any immediate reliability concerns.”

For the reasons stated below, the Committee denies Harquahala’s request for emergency relief.

Compliance Registry
In Order No. 693, the Federal Energy Regulatory Commission (Commission) approved mandatory and enforceable Reliability Standards that apply to owners, operators and users of the BPS. On June 18, 2007, 83 Commission-approved Reliability Standards became mandatory and enforceable. The Commission has approved the NERC Rules of Procedure, and it also has approved the NERC Statement of Compliance Registry Criteria (Rev. 3.1).

Rule 501.1.2.5 of NERC’s Rules of Procedure states that an entity directly connected to the bulk power system (BPS) selling, purchasing, or transmitting electric energy over the BPS will generally be considered a user of the BPS, unless the entity’s actions or facilities have no material impact on the BPS. Rule 501.1.2.2 states that all “electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher will be considered part of the bulk power system.” Rule 501.1.4 further provides that “[f]or all geographical or electrical areas of the bulk power system, the registration process shall ensure that (1) no areas are lacking any entities to perform the duties and tasks identified in and required by the reliability standards to the fullest extent practical, and (2) there is no duplication of such coverage or of required oversight of such

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116-390 Village Boulevard, Princeton, New Jersey 08540-5721
Phone: 609.452.8060 • Fax: 609.452.9550 • www.nerc.com
coverage.” The Statement of Compliance Registry Criteria (Rev. 3.1) provides that any entity reasonably deemed material to the reliability of the bulk power system will be registered, irrespective of other considerations.

**Analysis**

The NERC Board of Trustees Compliance Committee denies (i) Harquahala’s emergency request for removal from the Compliance Registry and (ii) Harquahala’s request for an agreement that Harquahala will not be exposed to penalties for noncompliance with the TO/TOP Reliability Standards and that such noncompliance will not be viewed as an aggravating factor in any potential noncompliance with other Reliability Standards until this matter is finally resolved.

Entities are included on the NERC Compliance Registry based on determinations by the applicable Regional Entity that the organization meets the registration criteria. Here, Harquahala objects to its inclusion on the NERC Compliance Registry by WECC and includes an emergency request that it be removed from the Compliance Registry until the appeal is resolved. The Committee has not previously had occasion to rule on a request for emergency relief, so it has not previously considered what standards to apply. Other jurisdictions, however, have considered that question at some length and have settled on appropriate standards to apply in such circumstances. For example, the Commission has adopted the following test: (1) irreparable harm to the moving party without the stay; (2) potential for harm to others if relief is granted; (3) relief is otherwise in the public interest. The Committee will adopt that same test. The Committee also adopts the Commission’s position that, if a party is unable to demonstrate that it will suffer irreparable harm absent a stay, it need not examine the other factors.

Harquahala has not alleged that it will suffer irreparable harm. Authorities that have considered the question do not normally regard financial impact as irreparable harm, and Harquahala has offered no quantification of the harm it claims it might suffer.

If Harquahala is permitted to be exempt from compliance during the pendency of an appeal, every owner, operator and user of the BPS would have an incentive to claim that they should not be included in the Compliance Registry to avoid compliance with the Commission-approved mandatory and enforceable Reliability Standards. In the event that a violation of the mandatory and enforceable Reliability Standards occurs by an entity appealing its inclusion on the Compliance Registry, and it is determined that such entity is properly on the Compliance Registry, then it can be held accountable for such violations. This would not be the case if an exemption were granted during the pendency of an appeal. The mandatory and enforceable Reliability Standards are in place because both Congress and the Commission recognize the

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2 See, e.g., CMS Midland, Inc., 56 FERC ¶ 61,177 at 61,631 (1991) (“In deciding whether a stay would be appropriate in a particular case, we generally consider several factors: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.”), aff’d sub nom. Michigan Municipal Cooperative Group v. FERC, 990 F.2d 1377 (D.C. Cir. 1993); Robin Pipeline Co., 92 FERC ¶ 61,217 (2000); Midwest Independent Transmission System Operator, Inc., 111 FERC ¶ 61,142 at P 18 (2005); Applicability of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities, 119 FERC ¶ 61,320 at P 8 (“Order Denying Stay”) (June 25, 2007), as amended by the Errata Notice, Docket No. RM07-11-000 (June 27, 2007), reh’g denied, 120 FERC ¶ 61,098 (2007) (“Order Denying Rehearing”).


4 See also Order Denying Request for Rehearing at P 11 n.13 (citing Wisconsin Gas Co. v. FERC, 758 FERC F.2d 669, 674 (D.C. Cir. 1985) (it is well settled that economic loss, in and of itself, does not constitute irreparable harm).
importance in ensuring the safety and reliability of the nation’s grid. NERC is committed to expeditiously processing the pending appeals so there can be no question about an entity’s obligation to comply with the Commission-approved Reliability Standards.

Significantly, the Commission has already had occasion to consider and reject requests for a stay from compliance with reliability standards during the pendency of an appeal before NERC and the Commission. On June 12, 2007, the City of Tampa, Florida, the Solid Waste Authority of Palm Beach County, Florida and Mosaic Fertilizer filed an Emergency Motion for Limited Stay and, In Addition, For Clarification of Order No. 696, which obligated qualifying facilities (QFs) to comply with the NERC Reliability Standards. The entities noted that they had filed appeals with NERC regarding their inclusion on the Compliance Registry and argued that:

[t]he public interest would be served by staying the effective date of the Reliability Rules as to these entities pending either (1) a NERC ruling reversing the determination by [the Regional Entity] or (2) the outcome of any Commission proceeding should NERC uphold [the Regional Entity’s] determinations. In addition, and in anticipation that NERC may not rule on the pending appeals before the effective date of Order 696, Renewable QFs seek clarification that Order No. 696 does not apply to Renewable QFs while their appeal remains pending.

The Commission issued an Order Denying Stay on June 25, 2007, on the grounds that the movants had not met the standard for granting a stay; however, in its Order Denying Stay, the Commission also made clear that QFs must comply with Order No. 696 unless they successfully appeal the registration. Specifically, the Commission “clarify[ed] that the movants are required to comply . . . unless they successfully appeal the registration.”

On June 28, 2007, these entities filed Request for Reconsideration of Order Denying Stay and Renewed Request for Clarification of Order No. 696. The Commission denied rehearing and once again reiterated that:

the movants are required to comply with Order No. 696 unless they successfully appeal the registration. “I.e., they must comply until such time as they may prevail. We see no need for further clarification.”

The NERC Board of Trustees Compliance Committee believes that the same holds true here.

The Commission also stated that unsupported claims that the entities will have to incur financial costs that may not be recoverable are insufficient, both factually and legally, to demonstrate the

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5. See Order Denying Stay, 119 FERC ¶ 61,320 at PP 1, 5.
6. Emergency Motion of the City of Tampa, Florida, the Solid Waste Authority of Palm Beach County, Florida and Mosaic Fertilizer for Limited Stay and, In Addition, For Clarification of Order No. 696, Docket No. RM07-11-000 (filed June 12, 2007).
8. Id.
9. Request of the City of Tampa, Florida, the Solid Waste Authority of Palm Beach County, Florida and Mosaic Fertilizer for Reconsideration of Order Denying Stay and Renewed Request for Clarification of Order No. 696, Docket No. RM07-11-000 (filed June 28, 2007) (“Renewed Request”).
need for a stay while they appeal the registration determinations. While Harquahala asserted it would be subject to potential significant financial penalties, Harquahala has failed to produce evidence of verifiable quantification of irreparable harm.

Chairman Joseph Kelliher also recently wrote a letter to Assistant Secretary John Paul Woodley, Jr., Assistant Secretary of the Army, clarifying an entity’s rights and responsibilities when included on the Compliance Registry:

Further, you should be aware that the Corps is currently registered by NERC as a generation owner, generation operator and transmission owner in several regions. Pursuant to NERC’s Rules of Procedure and its registry criteria, approved by the Commission, NERC and its Regional Entities register users, owners and operators of the bulk-power system that have facilities needed for reliability. NERC’s Rules include a process to challenge a registration determination. I understand that the Corps has chosen not to avail itself of this process but, rather, to raise its concerns directly to the Commission. Nonetheless, until it is determined otherwise, the Corps, as a registered entity, is expected to comply with applicable Reliability Standards.

As for Harquahala’s statement that it is a test case for entities owning interconnection facilities to be registered as a TO or TOP, the NERC Board of Trustees Compliance Committee notes that it recently has issued two rulings on this very issue in the Texas Regional Entity region. (See http://www.nerc.com/~org/registry_appeals.html.) Therefore, Harquahala’s contention it is a test case has no merit. Registrations occur on a case-by-case basis and remain ongoing throughout the regions. NERC has repeatedly reaffirmed its commitment to ensuring uniform and consistent application of its criteria across all regions. As NERC and the Regional Entities become aware of organizations that warrant inclusion on the Compliance Registry appropriate actions will be taken towards that end.

Other issues raised in the request for emergency removal, such as the potential for Harquahala to have a material impact to the grid, are matters that must be addressed on the merits of the case. By this action, the NERC Board of Trustees Compliance Committee is not considering the merits of Harquahala’s appeal nor is the committee prejudging any issues.

A Commission-approved process, set forth in the NERC Rules of Procedure, is in place for appeals of an entity’s inclusion on the NERC Compliance Registry. The NERC Board of Trustees Compliance Committee has been presented no evidence justifying an end-run around that Commission-approved process.

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12 Id. at P 11.
13 FERC Letter at 4.
Conclusion
The NERC Board of Trustees Compliance Committee denies Harquahala’s request for removal from the Compliance Registry and exemption for penalties for noncompliance during the pendency of its appeal.

Because the Committee has not acted on the merits of the appeal, the appeal provisions specified in Rule 501 of NERC’s Rules of Procedure do not apply. Once the NERC Board of Trustees Compliance Committee issues a decision on the merits of Harquahala’s appeal, Harquahala has the right to file an appeal of such a ruling with the Federal Energy Regulatory Commission, in accordance with 18 C.F.R. Part 385, within 21 days of the issuance of such a decision, as specified in Rule 501.1.3.4 of NERC’s Rules of Procedure.

By the Board of Trustees Compliance Committee