

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

Petition of the North American Electric)	
Reliability Corporation for Approval of)	Docket No. RR12-8-000
Revisions to its Rules of Procedure)	

**MOTION TO INTERVENE AND COMMENTS OF
AMERICAN PUBLIC POWER ASSOCIATION
EDISON ELECTRIC INSTITUTE, ELECTRIC CONSUMERS RESOURCE COUNCIL,
ELECTRIC POWER SUPPLY ASSOCIATION, AND NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION**

Pursuant to Rules 211 and 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214, the American Public Power Association, Edison Electric Institute , Electric Consumers Resource Council, Electric Power Supply Association, and National Rural Electric Cooperative Association (collectively “the Trade Associations”) respectfully submit this motion to intervene and comments in this docket in which the North American Electric Reliability Corporation (“NERC”) seeks approval of revisions to its Rules of Procedure (“ROP”).

I. MOTION TO INTERVENE AND COMMUNICATIONS

APPA is the national service organization representing the interests of more than 2,000 not-for-profit, publicly owned electric utilities in the United States. Currently, 328 of these utilities are included on the NERC compliance registry of entities subject to electric reliability standards.

EEI is the trade association of the shareholder-owned electric utilities in the United States. EEI member companies serve 95% of the ultimate customers in the shareholder-owned segment of the industry, and they represent approximately 70 percent of the U.S. electric power industry.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and consume power in the footprints of all organized markets and other regions throughout the United States.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

NRECA is the not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives, including 66 generation and transmission cooperatives that supply wholesale power to their distribution cooperative owner-members.

Members of the Trade Associations are required to comply with the mandatory reliability standards established and enforced by the Electric Reliability Organization and Regional Entities, pursuant to Federal Power Act section 215. As such, they are subject to the NERC ROP.

The Trade Association filed extensive comments with NERC on the proposed revisions to the ROP that led to this petition. On behalf of our respective members, each of the Trade Associations move to intervene in this proceeding.

All pleadings, correspondence and other communications concerning this proceeding should be directed to:

American Public Power Association

Susan N. Kelly
Senior Vice President of Policy Analysis
and General Counsel
Allen Mosher
Vice President of Policy Analysis
Reliability Standards
American Public Power Association
1875 Connecticut Ave., NW
Suite 1200
Washington, D.C. 20009
(202) 467-2944
amosher@publicpower.org

Edison Electric Institute

Barbara A. Hindin
Associate General Counsel
Edison Electric Institute
701 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 508-5019
bhindin@eei.org

Electricity Consumers Resource Council

John P. Hughes
Vice President, Technical Affairs
Electricity Consumers Resource Council
1111 Nineteenth St., NW Suite 700
Washington, D.C. 20036
(202) 682-8200
jhuges@elcon.org

Electric Power Supply Association

Nancy Bagot
Vice President of Regulatory Affairs
Jack Cashin
Director of Regulatory Affairs
Electric Power Supply Association
1401 New York Ave., NW
Suite 1230
Washington, D.C. 20005
(202) 628-8200
jcashin@epsa.org

National Rural Electric Cooperative Association

Richard Meyer

Senior Regulatory Counsel

Barry Lawson

Associate Director, Power Delivery and

Reliability Government Relations

National Rural Electric Cooperative

Association

4301 Wilson Blvd.

Arlington, VA 22203

(703) 907-5811

barry.lawson@nreca.coop

II. COMMENTS

As noted above, the Trade Associations filed extensive comments on the proposed revisions to the ROP during the comment periods provided by NERC. Several of the Trade Associations' earlier concerns were addressed by changes made by NERC before the package of revisions now before the Commission in this docket was presented to the NERC Board of Trustees ("Board") for approval in a special conference call meeting on March 14, 2012. Thus the Trade Associations support or do not oppose approval of nearly all of the changes to the ROP submitted by NERC on May 7, 2012 in the instant docket.

However, two proposed changes remain an area of great concern to the Trade Associations: 1) the proposal to allow Regional Entities acting as the Compliance Enforcement Authority ("CEA") to appeal the decision of a Hearing Body and 2) the proposal to allow NERC to "process" a decision by a Regional Entity Hearing Body. Many of the Trade Associations expressed their strong opposition to these provisions in their original comments on the proposed ROP revisions and in supplemental comments addressed to the NERC Board. These comments address these issues as well as concerns related to the NERC process for seeking stakeholder input on the proposed ROP revisions.

A. Appeals by Regional Entities of Hearing Body Decisions

1. Appeals under sections 403.15 and 409.1

Proposed ROP sections 403.15 and 409.1 provide Regional Entities the right to appeal Hearing Body decisions with which the Regional Entities are dissatisfied. In support of the revised provisions, NERC asserts that recent changes to NERC's hearing procedures now establish the Hearing Bodies as "independent tribunals," that are organizationally separate from the Regional Entities themselves. NERC asserts that for this reason Hearing Body decisions should be subject to a right of appeal when penalties are not assessed. (Petition at pp 13-15.)

The Trade Associations ask the Commission not to approve these changes. As articulated in earlier comments to NERC, the Trade Associations remain convinced that these proposed changes would unnecessarily change the enforcement balance now in effect under the ROP and is inconsistent with the spirit of section 215 of the Federal Power Act ("FPA") and 18 C.F.R. § 39.7. FPA Section 215(e) provides that a penalty "shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty" Likewise, 18 C.F.R. § 39.7(e)(1) provides that a penalty will be subject to review by the Commission on its own motion or upon application by the user, owner or operator of the Bulk-Power System that is the subject of the penalty.

While the statute and the Commission's regulation clearly contemplate that the entity to which the penalty would apply can appeal a NERC decision, neither of these provisions contemplate the appeal by a Regional Entity of a finding by its own Hearing Body that no penalty should be applied. Although this approach is asymmetrical, it has a sound basis: it

provides Registered Entities with appropriate due process while ensuring a reasonably speedy and final result. The same approach should be taken in the ROP with respect to decisions by regional Hearing Bodies.¹

The Trade Associations accept that the Hearing Bodies have a degree of independence from the Regional Entities (and, of course, from Registered Entities). However, ROP section 403.15 itself provides that the “Regional Entity hearing process shall be conducted before the Regional Entity board or a balanced committee established by and reporting to the Regional Entity board as the final adjudicator at the Regional Entity Level....”(emphasis added) The Trade Associations assert that this provision demonstrates that in fact the hearing processes established by Regional Entities may not be sufficiently independent – or may not appear to be sufficiently independent – to provide a Regional Entity an independent right to appeal the outcome of a hearing.

While on the surface of it, investing a Regional Entity with the same appellate rights as the Registered Entity would appear even-handed, the reality is very likely to be quite different. In fact, the Regional Entity's organizational link to, and familiarity with, NERC would dispose NERC to weigh the Regional Entity's views more heavily than those of the Registered Entity. As a consequence, the Trade Associations are concerned that any appellate process initiated by a Regional Entity, holds the strong potential to undermine the impartial hearing process, by effectively discouraging Registered Entities from exercising their right to a hearing. This would be a mistake because it would eviscerate an important objective check on the exercise of a Regional Entity's authority, a check reasonably called for by due process.

¹ In light of the backlog in the NERC and Regional Entity enforcement docket and the Commission's approval of the “Find, Fix, Track and Report” compliance enforcement initiative, it would seem counterproductive to introduce unnecessary and burdensome steps into the process.

For these reasons the Trade Associations request that the Commission not approve the changes to allow the Regional Entities to appeal the decision of their own Hearing Bodies to and direct NERC to make a compliance filing eliminating (or modifying) those provisions.²

2. Review and Processing of Decisions under Section 413

Proposed new ROP section 413 provides that NERC will review and process all final decisions by Regional Entity Hearing Bodies that are not appealed, as though the determinations had been made by the Regional Entities themselves. Importantly, the proposed rule provides that “NERC shall review and process such final decisions, and may require that they be modified by the Regional Entity.” While the Trade Associations appreciate NERC's interest in reviewing Hearing Body decisions in order to ensure a degree of consistency in the application of the Reliability Standards, in prior comments, the Trade Associations strongly urged NERC to exercise a high degree of deference in reviewing decisions that relieve Registered Entities of penalties, similar to the deference shown by appellate courts to trial courts.

An additional concern is the statement in section 413 that NERC may require that the decision be modified by the Regional Entity in accordance with among other section, section 5.8 of Appendix 4C, which allows NERC to “advise the Compliance Enforcement Authority of any additional detail or further development of the factual findings that NERC deems necessary before the Notice of Penalty is issued.” If read literally, this would appear to allow NERC in its review and processing of a decision by a Hearing Body to go outside of the record and possibly to have *ex parte* communications with the Compliance Enforcement Authority. The Trade

² The Trade Associations also object to other similar changes in the ROP and Compliance Monitoring and Enforcement Program in Appendix 4C to the ROP (CMEP) that would allow the Compliance Enforcement Authority (CEA) to appeal findings of a Hearing Body.

Associations are concerned that with no appeal, a decision of a Hearing Body could be subject to *de novo* review by NERC or NERC could request additional material without additional due process for the Registered Entity. Further, it would not appear appropriate for NERC to impose penalties directly in such circumstances, without providing further due process to a Registered Entity at the regional level.

3. These procedures, if approved, should be used rarely.

In the March 14, 2012 conference call in which the NERC Board approved the proposed revisions that are included in the Petition, several individual Board members addressed the concerns regarding these provisions raised by the Trade Associations, stating that NERC and the Regional Entities should exercise restraint in using the proposed appeal authority and should use it only to address incorrect procedural or legal decisions by the Hearing Body. Should the Commission approve these provisions, notwithstanding this Motion to Intervene and Comments, the Trade Associations request that Commission direct NERC to revise this provision as part of a compliance filing to limit exercise of this authority solely to address incorrect procedural or legal decisions by the Hearing Body.

B. The ROP Revision Process

On several occasions, the Trade Associations expressed to NERC their concern about the lack of transparency in the ROP revision process, in particular a minimal explanation as to the need and purpose of the proposed changes. Shortly before the ROP revisions were originally scheduled to go before the NERC Board at its February 2012 meeting, NERC did post more detailed explanations for the proposed ROP and a summary of stakeholder comments and

NERC's response to these comments. This was a step in the right direction and provided needed information to stakeholders. However, the information was only distributed shortly before the February 9, 2012 Board meeting, leaving stakeholders without an effective opportunity to include additional comments on the proposed revisions in their policy input to the Board and significantly limiting the ability to have an informed discussion at the MRC meeting on February 8, 2012.

To avoid a similar situation in the future, the Trade Associations asked NERC to implement the following two steps when proposing ROP changes:

- NERC should develop and post a clear rationale for each proposed change to the ROP to be included with the posting of the proposed modifications for stakeholder comment, explaining the proposed change and its supporting logic. A summary of the proposed changes that does not explain the rationale and basis for the changes is not sufficient.
- The final version of the proposed changes, including a redline text of the proposed changes, should be posted, when at all possible, not less than thirty (and in no case less than ten) working days prior to the NERC Board meetings, to allow stakeholders a constructive opportunity to review and, if necessary, submit comments prior to the Board's action through policy input and discussion at the MRC meeting.

During the March 14, 2012 conference call at which the NERC Board approved the proposed ROP revisions, the Board directed NERC staff to undertake process changes to ensure greater transparency and notice to stakeholders for any future revisions to the ROP. The Trade Associations ask that the Commission also direct NERC to adopt these provisions and make a compliance filing to include these provisions in the ROP.

III. Conclusion

For the reasons set forth above, the Trade Associations request that the Commission consider these comments and not approve the ROP provisions discussed in these comments that would give a Regional Entity the authority to appeal the decision of a Hearing Body and that would allow NERC to “process” Hearing Body decisions.³ Should the Commission approve those provisions, the Trade Associations ask that the Commission direct NERC to make a compliance filing to revise the rule such that NERC and the Regional Entities would only be able to exercise the authority to appeal the decision of a Hearing Body on rare occasions involving only issues of procedure or law and not to re-litigate the facts of an alleged violation or require them to be revised.

The Trade Associations also ask that the Commission FERC direct NERC to provide for greater transparency and information in future revisions to the ROP and to make a compliance filing setting forth such procedures.

Respectfully submitted,

³ As noted above, the Trade Associations support or do not oppose approval of the remaining changes to the ROP submitted by NERC on May 7, 2012 in the instant docket.

American Public Power Association

/s/ Allen Mosher

Allen Mosher

Vice President of Policy Analysis and
Reliability Standards

Susan N. Kelly

Senior Vice President of Policy Analysis
and General Counsel

American Public Power Association

1875 Connecticut Ave., NW

Suite 1200

Washington, D.C. 20009

(202) 467-2944

Edison Electric Institute

/s/ James P. Fama

Vice President, Energy Delivery

Barbara A. Hindin

Associate General Counsel

Edison Electric Institute

701 Pennsylvania Ave., NW

Washington, D.C. 20004

(202) 508-5019

bhindin@eei.org

Electricity Consumers Resource Council

/s/ John P. Hughes

John P. Hughes

Vice President, Technical Affairs

Electricity Consumers Resource Council

1111 Nineteenth St., NW Suite 700

Washington, D.C. 20036

(202) 682-8200

May 29, 2012

/s/ W. Richardson Bidstrup

W. Richard Bidstrup

Cleary Gottlieb Steen & Hamilton LLP

2000 Pennsylvania Ave., NW

Washington, D.C. 20006

(202) 974-1760

Electric Power Supply Association

/s/ Nancy Bagot

Nancy Bagot

Vice President of Regulatory Affairs

Jack Cashin

Director of Regulatory Affairs

Electric Power Supply Association

1401 New York Ave., NW

Suite 1230

Washington, D.C. 20005

(202) 628-8200

National Rural Electric Cooperative Association

/s/ Richard Meyer

Richard Meyer

Senior Regulatory Counsel

Barry Lawson

Associate Director, Power Delivery and

Reliability Government Relations

National Rural Electric Cooperative

Association

4301 Wilson Blvd.

Arlington, VA 22203

(703) 907-5811

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding

Dated at Washington, D.C., this 29th day of May, 12.

By /s/ Barbara A. Hindin

Barbara A. Hindin
Associate General Counsel
Edison Electric Institute
701 Pennsylvania Ave NW
Washington, D.C. 20004-2696
(202) 508-5019