

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

**Delegation Agreement Between the) Docket No. RR07-7-000
North American Electric Reliability Corporation)
and the Western Electricity Coordinating)
Council)**

**North American Electric Reliability Council and) Docket No. RR06-1-004
North American Electric Reliability Corporation)**

**ADVICE OF THE
WESTERN INTERCONNECTION REGIONAL ADVISORY BODY ON
THE DELEGATION AGREEMENT BETWEEN THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION AND THE
WESTERN ELECTRICITY COORDINATING COUNCIL
AND
THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION'S
PROPOSED RULES OF PROCEDURE**

The Western Interconnection Regional Advisory Body (WIRAB) submits advice to the Federal Regulatory Energy Commission (“Commission” or “FERC”) on the proposed Delegation Agreement between the North American Electric Reliability Corporation (NERC) and the Western Electricity Coordinating Council (WECC) filed with the Commission¹ under Docket No. RR07-7-000,² and on related confidentiality issues in NERC’s proposed Rules of Procedure filed by NERC under Docket No RR06-1-004.³

Section 215(j) of the Federal Power Act (FPA) authorizes WIRAB to provide the Commission advice whether “the governance of an existing or proposed regional entity

¹ Additional Compliance Filing and Request by the North American Electric Reliability Corporation to Approve Regional Delegation Agreements, Attachment 7 – Delegation Agreement Between NERC and Western Electricity Coordinating Council, November 29, 2006.

² FERC Notice of Filings, December 4, 2006.

³ Additional Compliance Filing of the North American Electric Reliability Council and the North American Electric Reliability Corporation Addressing Compliance Monitoring and Enforcement Program and *Pro Forma* Delegation Agreement, November 29, 2006.

within the same region . . . is just, reasonable, not unduly discriminatory or preferential, and in the public interest.”⁴ The WIRAB advice was unanimously approved by the 14 representatives of the Governors and Premiers of Alberta, Arizona, British Columbia, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming.

Background

The Energy Policy Act of 2005 (EPA) created a new Section 215 of the Federal Power Act (FPA).⁵ Section 215(e)(4) of FPA instructed the Commission to issue regulations authorizing the Electric Reliability Organization (ERO) “to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards” under specified conditions.⁶

On February 3, 2006, the Commission issued Order 672 that established regulations for certifying the ERO and included rules for delegation agreements under Section 39.8.⁷ The Commission also required the ERO applicant to submit a *pro forma* delegation agreement concurrently with the ERO application.⁸

⁴ Section 215(j) of the Federal Power Act (FPA), 16 U.S.C. 824.

⁵ Pub. L. No. 109-58, Title XII, Subtitle A, 119 Stat. 594, 941, codified at 16 U.S.C. 824o (2000).

⁶ Section 215(e)(4) of the FPA. Section 215(e)(4) of the FPA also requires “The ERO and the Commission shall rebuttably presume that a proposal for delegation to a regional entity organized on an Interconnection-wide basis promotes effective and efficient administration of the bulk-power system reliability and should be approved.”

⁷ *Rules Concerning Certification of the Electric Reliability Organization: Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, 71 FR 8662 (February 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006), *order on reh’g*, Order No. 672-A, 71 FR 19814 (April 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006). (Hereinafter *Order 672*)

⁸ Order 672 at P. 712.

On April 4, 2006, NERC filed with FERC an application to be the ERO.⁹ The application included proposed NERC Rules of Procedure and a *pro forma* delegation agreement.

On July 20, 2006, the Commission issued an Order certifying NERC as the ERO (Certification Order) and instructed NERC to make compliance filings consistent with the Certification Order.¹⁰

On October 18, 2006, NERC filed with FERC a compliance filing on non-governance issues.¹¹

On November 29, 2006, NERC filed with FERC additional compliance filings addressing its compliance monitoring and enforcement program, and providing a revised *pro forma* delegation agreement¹² and the proposed regional delegation agreements for each of the Regional Entities including the WECC-NERC delegation agreement.¹³

WIRAB has identified two issues of concern regarding the WECC-NERC delegation agreement that will be addressed below.

⁹ Request of the North American Electric Reliability Council and the North American Electric Reliability Corporation for Certification as the Electric Reliability Organization, Docket No. RR06-1-000, April 4, 2006.

¹⁰ Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing, 116 FERC ¶ 61,062, Docket No. RR06-1-000, July 20, 2006. (Certification Order)

¹¹ Compliance Filing of the North American Electric Reliability Council and the North American Electric Reliability Corporation Addressing Non-Governance Issues, Docket No. RR06-1-000, October 18, 2006.

¹² Additional Compliance Filing of the North American Electric Reliability Council and the North American Electric Reliability Corporation Addressing Compliance Monitoring and Enforcement Program and *Pro Forma* Delegation Agreement, November 29, 2006.

¹³ Additional Compliance Filing and Request by the North American Electric Reliability Corporation to Approve Regional Delegation Agreements, November 29, 2006

Issue 1: Approval of the NERC-WECC Delegation Agreement

WIRAB finds that the WECC-NERC delegation agreement meets the statutory and regulatory requirements pursuant to Section 215, except for Section 14 which is discussed in Issue 2 below.

WIRAB RECOMMENDATION

WIRAB recommends that the Commission approve the proposed WECC-NERC delegation agreement, subject to revisions necessary to implement WIRAB Recommendation 2 on confidentiality of information.

Issue 2: Confidentiality of Information

Over the past six years, Western States and Provinces have been advocating increased transparency of information to promote a reliable electric grid in the Western Interconnection. The Western Governors' Association (WGA) has adopted four resolutions on energy policy that call for greater transparency in electricity markets and endorsed proposed reforms that enhance transparency in transmission tariff policy.¹⁴ The Committee on Regional Electric Cooperation (CREPC) has repeatedly advocated for

¹⁴ WGA Policy Resolutions 01-01 (August 14, 2001), 02-26 (June 25, 2002), and 03-19 (September 15, 2003) called for the "creation of a centralized grid-wide database that tracks prospective demand, and tracks generation and transmission facilities under construction," and supported "efforts to ensure the availability of information on loads, transmission and generation where necessary for ensuring adequacy, efficiency and reliability of the grid." WGA Policy Resolution 05-02 (June 14, 2005) called on the Western electric power industry to implement policies and practices to deliver long term power, and that "[a]ny mechanism, process and related implementing organization should be transparent, including its analysis and decision making process." The WGA also submitted a letter to Chairman Kelliher dated August 3, 2006, endorsing the Commission's proposed reforms to the Open Access Transmission Tariff rules in Docket Nos. RM05-25 and RM05-17, and noting that these reforms comport with several recommendations of the WGA's Clean and Diversified Energy Advisory Committee.

greater transparency of energy information to the Commission,¹⁵ WECC,¹⁶ and the Energy Information Administration.¹⁷

WIRAB believes that Section 14 of the proposed WECC-NERC delegation agreement and Section 1500 of the proposed NERC Rules of Procedure undermine state and provincial efforts to improve transparency. The proposed confidentiality rules should be rejected by the Commission because NERC's proposal:

- A. Is contrary to the Commission's instructions in Order 672 and the Certification Order which appropriately favors greater public availability of information.
- B. Undermines state and provincial policies to improve assessments of the reliability and adequacy of the bulk power system, and federal policies to identify national interest electric transmission corridors..

A. NERC's confidentiality rules are contrary to the Commission's instructions in Order 672 and the Certification Order. WIRAB observes that over the past year, NERC has backtracked on proposed confidentiality rules and effectively ignored the Commission's instructions to tighten the use of confidentiality restrictions on information.

¹⁵ CREPC Comments to the Commission's NOPR on reforms of Order 888 in Docket Nos. RM05-25-000 and RM05-17-000, filed August 7, 2006, advocating greater transparency in ATC data and data for transmission planning. (<http://www.westgov.org/wieb/site/reports.html>)

¹⁶ CREPC Resolution: Transparency in Load and Resource Data, Assessment and Adequacy, Support for Draft WECC Exhibit B – Collection and Review of L and R Data, adopted September 29, 2006; and CREPC letter dated May 14, 2004 to Louise McCarren, CEO of WECC, regarding transparency of load forecasts reported in WECC's Load and Resources Summary Reports. (<http://www.westgov.org/wieb/site/reports.html>)

¹⁷ CREPC letter to John Colligan, Energy Information Agency, dated May 14, 2001, regarding transparency of data collected from power plants. (<http://www.westgov.org/wieb/site/reports.html>).

In Order 672, the Commission called on the ERO and Regional Entities to adopt confidentiality Rules.¹⁸ The Commission stated that “the ERO must address ERO disclosure-related Rules in its application for certification. If such rules do not apply to all Regional Entities, then each Regional Entity must address its disclosure Rules in the delegation agreements. The ERO or the Regional Entity should review a request for confidential treatment and make a determination if it is reasonable.”¹⁹ (emphasis added).

NERC’s April 4 application to become the ERO included an initial draft of NERC’s Rules of Procedure. Section 408.3 clearly placed the burden of confidentiality on those claiming confidentiality. “Bulk power system owners, operators and users seeking to protect information as confidential have the obligation to demonstrate that the information qualifies for confidential treatment.”²⁰ (emphasis added).

Notwithstanding this first effort to comply with Order 672, the Commission’s Certification Order of July 20 instructed NERC to go even further to ensure that information is not improperly placed under a confidential designation:

Section 408.3 of the proposed Rules of Procedure places the burden on users, owners, and operators of the Bulk-Power System who assert that specific information is confidential. However, this should be extended to apply to all entities that seek confidential treatment of information. We also believe that the proper time for the entity to make this showing of need for confidential treatment, in written form, is when the entity provides information to NERC or a Regional Entity.²¹ (emphasis added).

. . . NERC’s categorization of the particular types of information as competitively sensitive and thus confidential or otherwise exempt from public disclosure may be too broad. We direct NERC to explain in its compliance filing the basis by which NERC proposes that it and the Regional Entities would determine specific types of

¹⁸ Order 672 at P. 115.

¹⁹ *Id.*

²⁰ Section 408.3, Proposed NERC Rules of Procedure, April 4, 2006.

²¹ Certification Order at P. 658.

information as confidential or as otherwise exempt from public disclosure, including the treatment of settlements.²² (emphasis added).

Yet NERC's additional compliance filing on November 29 not only appears to ignore the Commission's instructions above, but actually proposes to make it *easier* to place NERC or a Regional Entity under the obligation to withhold information as confidential. The November 29th filing removes the former language of Section 408.3 and proposes to deal with confidential information in new Sections 1501 et seq. Section 1501 defines various categories of confidential information, including a very broad category of "confidential business and market information."²³ Section 1502.1 of the revised NERC Rules of Procedure then proceeds to shift the burden away from entities claiming information is confidential by granting complete discretion to those entities to mark documents confidential without meeting any burden to show that the documents are, in fact, appropriately categorized as such. That burden would involve showing that under the specific circumstances of each designation, the private interest in confidential designation outweighs the public interest in transparency.

1. Identification of Confidential Information – An owner, operator or user of the bulk power system and any other party (the "submitting entity") may mark as confidential any document that it submits to NERC or a regional entity (the "receiving entity") that it reasonably believes contains confidential information as defined by these rules.²⁴ (emphasis added)

²² *Id.* at P. 659.

²³ Section 1501.1 and Section 1501.2 of the NERC Rules of Procedure, November 29, 2006. Section 1501.2 states, "Confidential business and market information means any information which pertains to the interests of any business, which was developed or acquired by that business, and which is proprietary, competitively sensitive, or otherwise valuable."

²⁴ Section 1502.1 of the NERC Rules of Procedure, November 29, 2006.

At that point, the new proposed rules shift the burden of obtaining the information to a party who wishes to receive it and requires that party to establish a legal right to the information.²⁵

In short, NERC's prior version dated April 4 clearly placed the burden on the entity claiming confidentiality. The Commission's Order 672 called for the ERO and Regional Entity to make the determination of confidentiality and to base that determination on a reasonableness standard. The Commission's Certification Order affirmed the principle that the entity claiming confidential information has the burden to make such a showing. Yet the newly proposed rules allow a party to simply label information confidential without disclosing the reason therefore and then to shift the burden to others to claim a legal right to obtain disclosure.

This is of great concern to WIRAB because Section 14 of the proposed WECC-NERC delegation agreement, and other proposed delegation agreements, imposes restrictions on copying, disclosing or distributing any "Confidential Information" as defined by NERC's Rules of Procedure. If deemed confidential by any entity, the burden to gain access to such information is limited to the prior written permission by the issuing party, or required disclosure mandated by subpoena, law or other directive of a court, an administrative agency, or an arbitration panel under specified conditions.²⁶

NERC's non-governance compliance filings of October 18 and November 29 are unresponsive to the Commission's concern that confidential information based on competitively sensitive information is too broad, and does not explain why NERC

²⁵ Section 1503 of the NERC Rules of Procedure, November 29, 2006.

²⁶ Section 14 of the WECC Delegation Agreement, at 11; and Section 14 of the NERC *Pro Forma* Delegation Agreement, at 13.

proposes to shift the burden away from entities claiming confidentiality.²⁷ NERC's explanation for the proposed changes in confidentiality rules appears to reflect a preference for withholding information from the public. This approach is not acceptable for the broader public interest.

Moreover, NERC's confidentiality rules are antithetical to principles of openness and transparency embodied in the implementation of Section 215 and other FERC policy initiatives. The Commission and NERC have gone to extraordinary lengths to ensure that the standards development process under Section 215 is open and transparent. This is appropriate when implementing a federal law that effectively grants governmental power to an "industry self-regulating organization." That same approach must be applied to the availability of information that is the bedrock on which all Section 215 responsibilities rest. Unfortunately, the confidentiality provisions of Section 14 of the proposed delegation agreement, and the NERC Rules of Procedure and responses to FERC directions that underlie Section 14, undermine the goals of openness and transparency in standards development and all other Section 215 functions.

Additionally, the proposed NERC confidentiality rules run counter to the Commission's proposed reforms in Order 888 regarding the Open Access Transmission

²⁷ NERC Compliance Filing, October 18, 2006. NERC responded to the Certification Order with the following: (1) NERC and Regional Entities are not subject to the Freedom of Information Act (page 37); (2) Section 215 of the FPA or Order 672 does not require that the ERO or a regional entity make any information in its control available to the general public (page 37); (3) NERC and other entities submitting information do not have an obligation to provide information to the general public that is publicly available or independently available. (page 37-38); and (4) NERC claims that the new Section 1500 of the Rules of Procedure addressed the Commission's concerns raised in the Certification Order, including the Commission's statement that "NERC's categorization of particular types of information as competitively sensitive and thus confidential or otherwise exempt from public disclosure may be too broad." (page 69). These points are reiterated in NERC's Additional Compliance Filing of November 29, at pages 36 and 49.

Tariff (OATT).²⁸ The Commission identified the lack of transparency in open access tariffs as a key problem under existing rules.²⁹ The proposed reforms seek to improve transparency in Available Transfer Capability (ATC) calculations³⁰ and in transmission planning.³¹ NERC's policies may make much of the data used in transmission planning confidential.

B. NERC's confidentiality rules undermine state and provincial policies to improve assessments of the reliability and adequacy of the bulk power system, and federal policies to identify national interest electric transmission corridors. WIRAB believes that NERC's proposed confidentiality rules are not in the public interest in the West. NERC's rules hinder the dissemination of information necessary to perform effective resource assessment and adequacy analysis, and transmission planning.

For years, WECC has collected, but withheld from public release, information on load forecasts of load-serving entities. Load forecast information is the starting point for analyses of the adequacy of the transmission grid and the adequacy of generation and demand response. To maintain the confidentiality of load forecasts in its resource adequacy assessments, WECC aggregated load forecast data into six very broad sub-regions (e.g., the Northwest which includes Washington, Oregon, Idaho, Montana, Utah

²⁸ Preventing Undue Discrimination and Preference in Transmission Service, Docket Nos. RM05-25-000 and RM05-17-000, May 19, 2006. (888 Reform NOPR)

²⁹ 888 Reform NOPR at P. 30. "We agree that a lack of transparency both increases the potential for undue discrimination and makes it more difficult to detect. We believe this lack of sufficient transparency is caused in part by inadequate compliance with our existing OASIS regulations, and in part by inadequate transparency requirements."

³⁰ 888 Reform NOPR at P. 171. "[W]e propose to require transmission providers to take certain measures to make their ATC calculation process more transparent. We believe that these proposed changes will give transmission customers access to sufficient information to be able to examine the integrity of the process."

³¹ 888 Reform NOPR at P. 214. The Commission called for coordinated, open and transparent transmission planning to meet 8 principles. Principle 3: "Transparency – The transmission provider is required to disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie its transmission plans." Principle 4: "Information Exchange – Network transmission customers are required to submit information on their projected loads and resources on a comparable basis . . . as used by transmission providers in planning their native load."

and northern Nevada). This aggregation of load forecast data masks potential adequacy problems within the broad sub-regions and makes it impossible for outside parties, including the state and provincial governments who have the responsibility to take action when necessary to ensure adequacy of the power supply, to verify the quality of the analysis. The aggregation of load data renders conclusions on resource adequacy useless for the parties who can act to rectify inadequacy problems, namely market participants and state and provincial regulators.³²

Western states and provinces have pressured WECC to develop more robust analyses of resource adequacy and to make the data and analysis publicly available. States and Provinces have a critical role of monitoring and approving necessary investments in electricity infrastructure to meet future loads. Publicly-available data and analysis are essential if States and Provinces are to have sufficient confidence to approve such investments. We note that FERC has no authority under Section 215 of the FPA to order construction of transmission or generation to rectify resource inadequacies. By statute the ERO is required to issue reliability adequacy assessments³³ but is not permitted to adopt adequacy standards. NERC's assessments, as the ERO, rely on WECC reports that can not be reviewed with adequate granularity and verified as accurate by state and provincial regulators. Thus the entities that do have the authority to adopt adequacy requirements may find it impossible to use the NERC assessments to

³² Under Section 215(i)(2), FERC and the ERO are specifically precluded by Congress from ordering the construction of generation or transmission. Maintaining adequate transmission and generation infrastructure falls to market participants and state and provincial regulators. Wise infrastructure investment decisions require an understanding of the regional power market, such as what NERC and WECC reliability resource adequacy assessments should provide. However, the use of confidential data which can not be verified by outside parties and the lack of granularity in analyses severely limit the utility of WECC and NERC reliability assessments for state/provincial decision-makers and investors.

³³ Section 215(g) of the FPA.

justify doing so because of their inability to penetrate the labyrinth of confidential information designations allowed by the proposed NERC rules.

In December 2006, the WECC Board approved changes to its policies and will now require public release of all load forecasts in years four through ten of the forecast period and allow broader access to load forecast data for years one through three. Section 14 of the proposed delegation agreement and NERC's policies on confidentiality may undercut the progress being made in the West and perpetuate the withholding of information important to maintaining grid reliability. A decision by FERC to sanction the imposition of NERC's data confidentiality policies on WECC is likely to reverse progress being made in the West.

Additionally, NERC's confidentiality rules would likely diminish the availability of data used to support the Department of Energy (DOE) studies of transmission congestion that are the basis to identify national interest electric transmission corridors. Section 1221(a) of EPAct required DOE to complete a national study of transmission congestion by August 2006 and mandates an updated congestion study every three years thereafter. In 2006, three western entities formed the Western Congestion Assessment Task Force (WCATF)³⁴ to produce analyses for DOE on congestion in the Western Interconnection. In April 2006, the WCATF provided DOE with several types of analyses, including historical flows on major transmission paths.³⁵

³⁴ The three entities that formed WCATF were WECC, CREPC and the Seams Steering Group-Western Interconnection (SSG-WI).

³⁵ WCATF documents can be found on the WECC website at <http://www.wecc.biz/index.php?module=pagesetter&func=viewpub&tid=5&pid=42> In future years, WECC's Transmission Expansion Planning Policy Committee (TEPPC) will be coordinating analyses of congestion in the Western Interconnection for DOE's Section 1221 congestion studies.

The analysis of historical flows on western transmission paths built upon a 2003 study by the Seams Steering Group-Western Interconnection (SSG-WI).³⁶ The primary source of data for the historical path analysis is WECC's Extra High Voltage (EHV) data pool. The EHV data pool collects information on flows on key transmission lines and the output of major generators every 60 seconds. The primary purpose of the data pool is to coordinate and monitor systems operations.³⁷ This real-time information is important for Reliability Centers and system operators. The information is also useful for after-the-fact analyses of the system such as the WCATF and SSG-WI historical flow analysis.

In the Western Interconnection, all parties provided this information to WECC's EHV data pool until the California ISO decided to stop providing such information to a public web site on a timely basis. Delays in the release of such information have exceeded more than 400 days. The California ISO refused to release the information on grounds that it was market sensitive information.³⁸ After the ISO refused to provide the information to the public web site, other entities started delaying their release of data to the EHV data pool website. The argument is: why should we provide data for a public good like the EHV data pool when other entities are not doing so?

NERC's proposed Rules of Procedure would allow any party to label their information confidential. Given the West's experience with entities claiming confidentiality on data for the EHV data pool, WIRAB is very concerned that the proposed NERC confidentiality rules will create a cascading effect where an increasing

³⁶ Seams Steering Group – Western Interconnection, Western Interconnection Transmission Path Flow Study, February 2003.

³⁷ WSCC EHV DataPool/WebSite Confidentiality Issues White Paper, October 6, 2000.

³⁸ Letter from the California ISO to Dennis Eyre, Director of WSCC, dated October 11, 2000, regarding the California ISO Data on the EHV Data Pool. WIRAB notes that the decision to withhold data from the EHV data pool has not precluded access to such information by well-heeled parties. Enterprising companies now sell this information to those who can afford it.

number of parties will ultimately withhold or delay release of information, such as information provided to WECC's EHV data pool, to public sources. NERC's policies will encourage a "lowest common denominator" approach to sharing of information necessary to maintain grid reliability. It may also conceal important information that should be publicly available to DOE to identify transmission congestion in the West under Section 1221 of EPCRA.

WIRAB RECOMMENDATION:

WIRAB recommends that the Commission require modification of the proposed confidentiality rules in Section 1500 of the NERC Rules of Procedure as follows. First, the Commission should clearly establish that entities seeking to protect information as confidential have the burden to demonstrate to the ERO or Regional Entities that the information qualifies for confidential treatment. The ERO and Regional Entities shall make determinations on claims for confidentiality based on a reasonableness standard. For claims of confidentiality based on "business and market information" defined in Section 1500, the ERO and Regional Entities shall place great weight on the public interest benefits of transparency and apply a strict scrutiny standard.

Second, if the ERO or a Regional Entity grants a request to restrict access to information deemed confidential, the ERO or Regional Entity must publicly post its determination on the type of information deemed confidential. This requirement promotes openness in the process of making confidentiality determinations and encourages consistency among the ERO and Regional Entities in making such confidentiality determinations.

In the alternative, if the Commission does not choose to require modification of the NERC Rules of Procedure as proposed above, WIRAB advises the Commission to delete the proposed Section 14 of the NERC-WECC delegation agreement.

Finally, WIRAB recommends that the Commission clearly state as a guiding principle that it expects information used in the implementation of Section 215, to the maximum extent possible, will be in the public domain and that all claims of confidentiality for business reasons will be carefully scrutinized.

Dated this 10th day of January, 2007.

Respectfully submitted,

A handwritten signature in black ink that reads "John F. Savage". The signature is written in a cursive, flowing style.

John Savage, Chairman
Western Interconnection Regional Advisory Body