

**ADVICE OF THE  
WESTERN INTERCONNECTION REGIONAL ADVISORY BODY TO THE  
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION  
REGARDING ITS SECOND DRAFT THREE-YEAR ASSESSMENT DATED  
APRIL 27, 2009**

The Western Interconnection Regional Advisory Body (WIRAB) submits advice to the North American Electric Reliability Corporation (NERC) regarding its second draft three-year self assessment dated April 27, 2009.

NERC is required to submit to the Federal Energy Regulatory Commission (FERC) an assessment of its performance three years after being certified as the Electric Reliability Organization (ERO). NERC released a first draft of the assessment on January 14, 2009 and solicited comments from interested stakeholders. WIRAB submitted advice dated March 3, 2009 on NERC's first draft of the assessment. NERC issued a second draft of the assessment on April 27, 2009.

WIRAB's present advice focuses on two new issues that emerged in the April 27 assessment: (1) whether NERC should require that Regional Entity compliance programs report exclusively to independent directors; and (2) whether NERC should participate earlier in the compliance and enforcement processes as they are implemented by the Regional Entities. WIRAB intends to continue to carefully track the development of the NERC three-year assessment and may offer additional advice prior to its submission to FERC.

**A. Should NERC require that Regional Entity compliance programs report exclusively to independent directors?**

At page 30 of the April 27 assessment, NERC proposes a change in the governance structure for Regional Entities applicable to compliance programs.

Finally, while stakeholder and hybrid boards are appropriate and have proven successful for most of the delegated activities, NERC believes the time has come for all compliance programs to report to independent directors. . . . But the time has come to remove the subtle and not-so-subtle influences over compliance staff that can come from having to carry out enforcement activities against some of the same entities that have control over compensation and budgets. NERC, Draft Three-Year ERO Performance Assessment, April 27, 2009, at 30.

WIRAB offers five observations:

**1. NERC has not made the case to justify a change in the composition of the WECC Board.**

WIRAB appreciates NERC's efforts to undertake a comprehensive self-examination that identifies problems and proposes steps to improve its role in carrying out Section 215 of the Federal Power Act (FPA). With regard to this particular issue, however, we only have a cursory explanation (1) why NERC believes this issue is a problem and (2) the rationale for the proposed solution. NERC needs to provide a more detailed explanation of the concerns it sees in the current governance structure and a more complete statement of what needs to change.

Are NERC's concerns based on observations of actual behavior of directors compromising compliance programs among Regional Entities over the past three years? Are these concerns reflected in stakeholder comments? Alternatively, is NERC's

proposal grounded in its own policy preference to fully separate a Regional Entity's management and implementation from any users, owners and operators of the bulk power system? Does NERC believe Congress erred in providing in the Federal Power Act that Regional Entities could have balanced stakeholder or hybrid Boards of Directors? Is NERC's proposal intended to correct Congress's error?

If NERC's proposal is motivated by actual problem behavior, do the facts suggest a widespread problem across multiple Regional Entities or an isolated case of bad actors? In the latter case of a potential conflict of interest, might there be other institutional mechanisms in place that provide checks and balances to insulate undue influence in a Regional Entity enforcement program?

**2. NERC needs to explain how its concerns apply to the WECC Board.**

WECC has a hybrid Board of Directors that consists of 32-members that is balanced to reflect the stakeholders in the Western Interconnection. The specific categories and allocations for the WECC Board are as follows:

- Non-affiliated – seven
- End users – four
- State government or regulatory bodies – four
- Canadian provinces – four
- Mexico's Comision Federal de Electricidad – one
- Owning or operating transmission, or involved in the United States electric industry – twelve

The balanced stakeholder Board for WECC serves to limit the potential influence of any one group in decisions before the Board. We assume that the "independent" label

would apply to the non-affiliated category and the end use and state government or regulatory bodies categories, assuming that the directors who are elected by those classes do not have personal investments or income from United States entities who participate in the Western Interconnection power business. This needs to be clarified, however, since NERC's proposal does not precisely define what it means to be "independent."

We believe there may well be existing checks and balances in the current organizational structure of WECC to prevent any real conflicts of interest from Board interaction with the compliance program. WECC's Board has direct authority to hire and fire the WECC CEO. Apart from that, the WECC Board has limited authority to influence the WECC compliance program. The Board can not hire or fire personnel within the WECC staff employed in the compliance program. The Board does not review and make decisions on specific compliance and enforcement actions impacting a given registered entity. This is very different from the direct participation of NERC Board members in reviewing individual violations, penalties and assessments. NERC needs to specifically address what is wrong with the way WECC is handling this area so that any specific recommended change can be evaluated for its potential to solve a real world problem.

WIRAB has not been aware of a problem in WECC's governance structure that could compromise the integrity of WECC's compliance program. If NERC has specific concerns related to WECC's governance and compliance program, we ask that NERC reveal and elaborate on the nature of those concerns.

**3. Changing the membership of the WECC board would require a complicated process of readjustment.**

For example, WECC has made special provisions in its FERC-approved bylaws to ensure an international component with the Canadian and Mexican classes of directors. Does NERC propose that those provisions be changed? Is changing the composition of the WECC Board a priority for NERC given the plethora of challenges faced in successfully implementing Section 215?

**4. An additional issue that needs further definition is what NERC means by the phrase “reports to.”**

Does this mean that if the compliance staff reports to the CEO, the CEO must report to only “independent” directors? Does it mean that the budget for the compliance function may only be reviewed by “independent” directors? Does it mean that if the hybrid WECC Board wishes to establish an advisory committee to assist the WECC compliance staff in thinking through some of the tough policy issues that it must address, but that committee does not have authority to direct how the staff implements any of those issues or to supervise day to day or case by case operation of the compliance function, the members of that advisory committee must all be “independent” directors? Plainly, if the answer to any or all of these questions is “yes,” the WECC hybrid Board structure is seriously compromised and the benefits of having some stakeholder participation are lost for the most important function a Regional Entity performs.

**5. NERC does not have the legal authority to require a change in the composition of the WECC Board**

Under Section 215(e)(4) of the FPA, NERC has authority to enter into delegation agreements with Regional Entities providing that the Regional Entity is governed by – (i) an independent board; (ii) a balanced stakeholder board; or (iii) a combination

independent and balanced stakeholder board. 16 U.S.C. 824o(e)(4). The FPA clearly did not limit Regional Entity governance to independent boards. Rather, it specifically identified the potential for Regional Entities to have either a balanced stakeholder board or a hybrid independent and balanced stakeholder board. NERC's proposal to require Regional Entities to have independent directors over the enforcement programs would be a significant restriction on the governance framework available to Regional Entities. We question whether NERC has the legal authority to unilaterally decide to exclude from delegation Regional Entities that have a different governing structure than the one NERC has.

**B. Should NERC participate earlier in the compliance and enforcement processes as they are implemented by the Regional Entities?**

At page 29 of the April 27 assessment, NERC proposes to amend the delegation agreements with Regional Entities in three areas.

However, to achieve the level of consistent, transparent, efficient and timely performance expected of the ERO, the delegation agreements will need to be amended to provide [1] specific performance metrics, [2] require consistent application, and [3] provide for participation by NERC earlier in the CMEP process as they are implemented by the Regional Entities.

WIRAB strongly agrees with the need to develop specific and meaningful performance measures for the compliance and enforcement program. Such measures would include the performance of all elements of the compliance and enforcement system

from Regional Entities to NERC to FERC. We do not believe this requires a change in delegation agreements.

WIRAB does not understand and expresses concern with NERC's third proposal for earlier participation by NERC in the Regional Entity Compliance, Monitoring and Enforcement Program (CMEP) process. Does NERC believe that early involvement means substituting its judgment for the judgment of the WECC CMEP staff? If so, WIRAB opposes NERC's proposal as undercutting the authority delegated to WECC, duplicating WECC efforts, and creating more confusion in the CMEP process. We believe it would be a mistake for NERC to micromanage Regional Entity compliance decisions.

We note that the current model is analogous to the federal court system where district courts deal with fact-based cases and the reviewing appellate courts ensure that the trial courts have properly implemented the law. Appellate courts do not "participate earlier" in trial court proceedings to ensure that the trial courts are doing their fact-finding work well. Rather, they review the fact-based evidentiary records of the trial court decisions and grant the trial court considerable deference for its findings of fact even though the appellate court can always reverse a decision when it is clearly erroneous. Similarly, NERC has the undisputed power to supervise how the Regional Entities do their work to ensure consistency, but it should do so by reviewing their decisions, not by directing their day to day operations.

NERC should:

- Provide broad guidelines, precedents, or best practices learned among the Regional Entities which would be a useful resource for individual Regional Entity compliance programs; and
- Upon WECC's request, provide WECC assistance on particularly complex compliance issues.

We invite NERC to provide further explanation of the motivation and rationale for earlier participation in the compliance process of Regional Entities.

We urge NERC not to begin the process of abandoning the delegated model when the delegation agreements are not even two years old.

Dated this 29<sup>th</sup> day of May, 2009.

Respectfully submitted,

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

John Savage, Chairman  
Western Interconnection Regional Advisory Body