

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

Western Electricity Coordinating Council)	Docket No. EL13-52-001
North American Electric Reliability Corporation)	Docket No. RR13-10-001
Western Electricity Coordinating Council)	Docket No. RR13-12-001
		(Not Consolidated)

**MOTION FOR LEAVE TO ANSWER PROTEST AND ANSWER OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (the “Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213, the North American Electric Reliability Corporation (“NERC”)¹ hereby moves to answer the protest and comments of the Edison Electric Institute (“EEI”) filed in the above-referenced dockets (“EEI Protest”).² The EEI Protest merits a response to clarify the record so that the Commission will have a correct and complete record before it regarding NERC’s compliance filing submitted in response to a Commission order rejecting EEI’s request for rehearing in this proceeding.³

I. MOTION FOR LEAVE TO ANSWER

The Commission’s rules generally do not permit the filing of answers to answers; however, the Commission has granted leave to file such answers if they clarify the issues in

¹ NERC was certified by FERC as the electric reliability organization (“ERO”) authorized by Section 215 of the Federal Power Act. FERC certified NERC as the ERO in its order issued July 20, 2006 in Docket No. RR06-1-000. *Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 61,062 (2006) (“ERO Certification Order”).

² NERC requests waiver of Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2), to permit an answer to the EEI Protest. Good cause for this waiver exists here because the answer will aid the Commission in understanding the issues in the proceeding, provide additional information to assist the Commission in the decision-making process, and help to ensure a complete and accurate record in the case. *See, e.g., Xcel Energy Services, Inc.*, 124 FERC ¶ 61,011, at P 20 (2008); *California Independent System Operator Corp.*, 132 FERC ¶ 61,023, at P 16 (2010); *Equitrans, L.P.*, 134 FERC ¶ 61,250, at P 6 (2011).

³ *Order on Rehearing, Independent Reliability Coordinator for Western Interconnection Filings, and Directing Compliance Filings*, 145 FERC ¶ 61,202 (2013) (“December 6 Order”).

dispute, ensure a complete and accurate record, or otherwise provide information that will assist the Commission in its decision-making process.⁴ To ensure that the Commission has complete and accurate information upon which to make a decision, NERC requests leave to submit this response to the EEI Protest.

II. BACKGROUND

On June 20, 2013, in Docket No. EL13-52-000, the Commission conditionally granted a request by the Western Electricity Coordinating Council (“WECC”)⁵ for a declaratory order regarding WECC’s transferring of its Reliability Coordinator (“RC”) and Interchange Authority (“IA”) registered functions to a newly-formed and independent company (subsequently named Peak Reliability, Inc.).⁶ In addition, the Commission approved WECC’s proposal that the RC and IA functions, when assumed by Peak Reliability, would continue to be considered statutory functions under Section 215 of the Federal Power Act (“FPA”) to be funded by statutory assessments to Load Serving Entities in the WECC Region.⁷

On July 22, 2013, EEI requested rehearing, asserting that the Commission erred in finding that WECC RC and IA functions, when performed by Peak Reliability, are eligible for Section 215 funding.⁸ The December 6 Order rejected the EEI rehearing request, conditionally

⁴ See, e.g., *San Diego Gas & Electric v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,219, at P 14, n. 17 (2004) (answer was accepted as it “provided information that assisted [the Commission in its] decision-making process”); *Michigan Electric Transmission Co.*, 106 FERC ¶ 61,064, at P 3 (2004) (the permitted answer “provides information that clarifies the issues”); *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062, at P 24 (2006) (reply comments of NERC and others accepted “because they have provided information that assisted us in our decision making process”); *North American Electric Reliability Corporation*, 117 FERC ¶ 61,091, at P 18 (2006) (same); *North American Electric Reliability Corporation*, 119 FERC ¶ 61,248, at P 6 (2007); *North American Electric Reliability Corporation*, 127 FERC ¶ 61,209, at P 5 (2009).

⁵ WECC supports NERC’s motion and answer and encourages the Commission to reject the EEI Protest.

⁶ *Western Electricity Coordinating Council, Order on Petition for Declaratory Order*, 143 FERC ¶ 61,239 (2013) (“WECC Declaratory Order”).

⁷ The Commission originally ruled that WECC’s costs to perform the RC function in the WECC Region could be funded through statutory assessments pursuant to FPA §215 in an order on rehearing issued April 19, 2007. *North American Electric Reliability Corp., Order on Rehearing*, 119 FERC ¶ 61,059 (2007).

⁸ *Request for Rehearing of the Edison Electric Institute*, Docket No. EL13-52-001 (July 22, 2013).

accepted the proposed Peak Reliability governance documents and allowed FPA section 215 funding, if WECC clarified in a compliance filing that WECC is implementing the bifurcation via a sub-delegation structure as described in WECC's initial petition and approved in the WECC Declaratory Order. The Commission also accepted a modified NERC-WECC delegation agreement, subject to the condition that NERC submit a compliance filing maintaining the language in section 1 of Exhibit E of the amended NERC-WECC Delegation Agreement that NERC had proposed to delete.

WECC submitted a compliance filing to FERC on December 19, 2013. NERC submitted a compliance filing to FERC on December 20, 2013. The EEI Protest was filed with FERC on January 9, 2014.

III. ANSWER

NERC's December 20, 2013, compliance filing concerns the following discrete issues in response to the December 6 Order: 1) a revision to Exhibit E to the NERC-WECC Delegation Agreement to restore certain language that NERC had proposed to delete; 2) confirmation that NERC intended to seek waiver of Rule 1205 of NERC's Rules of Procedure in support of sub-delegation of the RC and IA functions as proposed by WECC to Peak Reliability; and 3) confirmation that NERC does not currently intend to file a supplemental funding request to fund WECC's performance of the responsibilities and functions that WECC proposes to sub-delegate to Peak Reliability.

However, the thrust of the EEI Protest argues that Peak Reliability is ineligible to receive Section 215 funding during a two-year transitional period, during which time WECC and Peak

Reliability have committed to develop an alternative funding mechanism.⁹ That argument is beyond the scope of the compliance filing. Despite having its arguments rejected on rehearing, EEI seeks yet another bite at the apple to rehash those arguments at this compliance phase. This should not be permitted by the Commission.

NERC did in its compliance filing what the Commission had directed NERC to do, in order to ensure a smooth transition of the WECC RC function to Peak Reliability.

A. The EEI Protest is Beyond the Scope of NERC's Compliance Filing

The December 6 Order rejected EEI's request for rehearing and affirmed that Peak Reliability is eligible to receive Section 215 funding:

*We affirm that Peak Reliability would be eligible for FPA section 215 funding based on the conditions set forth in the Declaratory Order (i.e., WECC sub-delegates the reliability coordinator function to Peak Reliability). EEI argues that Peak Reliability cannot receive statutory funds to perform that function because Peak Reliability is not the ERO or a Regional Entity, and it cannot receive statutory funding to perform the duties of a registered entity. The Declaratory Order addressed EEI's argument by concluding that having Peak Reliability carry out the reliability coordinator function pursuant to a sub-delegation agreement "does not materially change the factual basis for the Commission's determination to permit FPA section 215 funding for the WECC reliability coordinator [in the April 19, 2007 Order]."...*¹⁰ (*Emphasis added*).

Notwithstanding that EEI raised and the Commission rejected the argument on rehearing – that Peak Reliability is ineligible to receive FPA Section 215 funding – EEI now challenges the Commission's determination that was made and affirmed in an earlier phase of this proceeding.¹¹

⁹ EEI Protest at p. 7 (citing *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, at P 229, FERC Stats. & Regs. ¶ 31,204 at P 202 (2006), *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006), *modified* by 123 FERC ¶ 61,046 (2007)); *But cf.* Order No. 672-A at P 65 ("The isolated preamble language cited by [commenter] was not intended to limit the scope of ERO activities that may be funded... [The Commission] will consider what a permissible statutory activity is when we see a specific proposal.").

¹⁰ December 6 Order at P 40.

¹¹ EEI Protest at p. 7.

The EEI Protest is not a direct appeal of the December 6 Order, but attempts to resurrect arguments concerning FPA Section 215, in response to the WECC and NERC compliance filings. Accordingly, at this phase in the proceeding, the Commission should reject the EEI Protest as beyond the scope of the NERC compliance filing.¹²

B. Waiver of Section 1205 of the NERC Rules of Procedure is Permissible

In the December 6 Order, the Commission concluded that Section 1205 of the NERC Rules of Procedure could be waived:

On rehearing, EEI argues that sub-delegation is not permitted under Rule 1205 of the NERC Rules of Procedure and the discussion of Rule 1205 in the NERC Certification Order, although EEI notes that “Regional Entities could use sub-contractors and consultants.” We do not believe Rule 1205 is necessarily an impediment to the sub-delegation structure. Section 100 of the NERC Rules of Procedure affords NERC flexibility in how NERC addresses compliance with its rules. In addition, section 10 of the NERC-WECC Delegation Agreement indicates that WECC may sub-delegate an activity with NERC’s express consent and without mention of other limitations. Further, NERC indicated in response to WECC’s petition for declaratory order that it supports the establishment of Peak Reliability and nowhere stated that Rule 1205 would be an impediment to a sub-delegation agreement between WECC and Peak Reliability, which was integral to WECC’s proposal. *Accordingly, the Commission concludes that Rule 1205 could be waived. NERC and WECC should indicate in their compliance filings whether they intended to seek such a waiver.*¹³ (*Emphasis added*).

NERC confirmed in its compliance filing that “in agreeing to and supporting the sub-delegation of certain responsibilities and functions in the Western Interconnection as proposed by WECC to Peak Reliability, NERC intended to seek a waiver of the provision of Section 1205 of the NERC Rules of Procedure....”¹⁴ Moreover, the EEI Protest acknowledges that WECC and NERC indicated in their respective compliance filings that they seek a waiver of Rule 1205.¹⁵

¹² See, e.g., *Order on Compliance Filings*, 144 FERC ¶ 61,054, at P 12 (2013) (“A collateral attack is [defined as] an ‘attack on a judgment in a proceeding other than a direct appeal’ and is generally prohibited.”)(citing *Wall v. Kholi*, 131 S.Ct. 1278, 1284 (2011) (quoting *Black’s Law Dictionary* 298 (9th ed. 2009)).

¹³ December 6 Order at P 41 (*citations omitted*).

¹⁴ NERC Compliance Filing at p. 1.

¹⁵ EEI Protest at p. 17.

Therefore, with respect to Rule 1205, WECC and NERC complied with the December 6 Order by confirming that Rule 1205 was intended to be waived. NERC's compliance filing should be accepted by the Commission.

C. Sub-delegation under Section 215 of the FPA is Permitted

The EEI Protest argues that Section 215 of the FPA does not permit sub-delegation of the WECC RC and IA functions to Peak Reliability.¹⁶ The Commission stated in the December 6 Order (at P 40) that:

[T]he sub-delegation relationship as WECC proposed adequately ensures that there is a connection from the ERO, to the Regional Entity and then to new Peak Reliability to maintain FPA section 215 funding consistent with the April 19, 2007 Order. *Further, nothing in FPA section 215(e)(4) or Part 39 of the Commission's regulations prohibits a sub-delegation as WECC proposed and the Commission accepted in the Declaratory Order. (Emphasis added).*

Thus, the Commission determined in the December 6 Order that FPA Section 215 does not prohibit sub-delegation from WECC to Peak Reliability. Still, once again, EEI attempts to revisit the same arguments concerning sub-delegation and Section 215 that were argued and rejected on rehearing. This is simply another argument by EEI that is beyond the scope of the NERC compliance filing and should be rejected by the Commission.

¹⁶ *Id.* at p. 15.

IV. CONCLUSION

NERC respectfully requests that the Commission accept NERC's answer and its compliance filing.

Respectfully submitted,

/s/ Willie L. Phillips

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Dated: January 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 24th day of January, 2014.

/s/ Willie L. Phillips

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