

139 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

U.S. Department of Energy,
Portsmouth/Paducah Project Office

Docket No. RC08-5-001

ORDER GRANTING APPEAL OF ELECTRIC RELIABILITY
ORGANIZATION COMPLIANCE REGISTRY DETERMINATION AND
REMANDING FOR FURTHER PROCEEDING

(Issued April 19, 2012)

1. In this order, the Commission grants the appeal of the United States Department of Energy, Portsmouth/Paducah Project Office (DOE Portsmouth) and finds that it should not be registered as a load-serving entity under the North American Electric Reliability Corporation (NERC) Statement of Compliance Registry Criteria (Registry Criteria).¹ The Commission finds that the additional information provided by NERC on remand from our earlier order² is insufficient to support registration of DOE Portsmouth as a load-serving entity. Specifically, NERC has not supported its assertion that the lessees and contractors on the site are separate end-use customers served by DOE Portsmouth. Further, as discussed below, the Commission believes that Ohio Valley Electric Corporation (OVEC), which sells energy to DOE Portsmouth pursuant to a retail sales tariff, is the appropriate entity to register as the load-serving entity. Accordingly, NERC should either register OVEC as a load-serving entity or, within 90 days of the date of this order, submit a filing explaining why OVEC should not be registered for the load-serving entity function.

¹ NERC's amended Registry Criteria (Version 5.0) were approved by the Commission in *North American Electric Reliability Corp.*, 122 FERC ¶ 61,101 (2008) (NERC).

² *North American Electric Reliability Corp.*, 124 FERC ¶ 61,072 (2008) (July 2008 Order).

I. Background

A. NERC Registry Criteria

2. In July 2006, the Commission certified NERC as the Electric Reliability Organization (ERO) pursuant to section 215 of the Federal Power Act (FPA).³ In certifying NERC as the ERO, the Commission also approved NERC's Rules of Procedure, which, *inter alia*, provide rules for the registration of users, owners and operators of the Bulk-Power System to comply with Reliability Standards.⁴ In April 2007, the Commission approved delegation agreements between NERC and eight Regional Entities, including a delegation agreement between NERC and ReliabilityFirst.⁵ In that delegation agreement, NERC provided ReliabilityFirst with the authority to enforce mandatory Reliability Standards within its territory and add entities to the compliance registry.

3. In Order No. 693, the Commission approved 83 Reliability Standards, which became effective on June 18, 2007.⁶ Further, in Order No. 693, the Commission approved NERC's compliance registry process, including NERC's Statement of Compliance Registry Criteria (Registry Criteria), which describes how NERC and the Regional Entities will identify entities that should be registered for compliance with mandatory Reliability Standards.⁷ Most relevant to this proceeding, the Registry Criteria define a load-serving entity (or LSE) as an entity that "secures energy and transmission service (and related interconnected operations services) to serve the electrical demand

³ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,190, *order on reh'g* 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009); 16 U.S.C. § 824o (2006).

⁴ *See* NERC Rules of Procedure, section 500 (Organization Registration and Certification).

⁵ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 at P 316, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

⁶ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁷ Order No. 693 at P 92-95. The Commission has approved subsequent amendments to the Registry Criteria. *See NERC*, 122 FERC ¶ 61,101.

and energy requirements of its end-use customers.” The NERC Registry Criteria provide the following additional thresholds for registering an entity as a load-serving entity:⁸

- III.a.1 Load-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system, or
- III.a.2 Load-serving entity is designated as the responsible entity for facilities that are part of a required underfrequency load shedding (UFLS) program designed, installed, and operated for the protection of the bulk power system, or
- III.a.3 Load-serving entity is designated as the responsible entity for facilities that are part of a required undervoltage load shedding (UVLS) program designed, installed, and operated for the protection of the bulk power system.

B. Description of DOE Portsmouth Facilities

4. DOE Portsmouth owns the Portsmouth Gaseous Diffusion Plant near Piketon, Ohio (Facility), a uranium enrichment plant. In 2008, the Facility included two 345 kV switchyards, X530 and X533, which had approximately 2,200 MW of capacity interconnected with the transmission system of the Ohio Valley Electric Corporation (OVEC). By 2011, switchyard X533 was decommissioned and was being decontaminated and dismantled. The remaining switchyard, X530, allows power to be directed to load-serving step-down transformers, to serve the Facility’s load of approximately 45 MW, or be redirected to the regional power grid. DOE Portsmouth’s predecessor and OVEC entered into a comprehensive power agreement in 1952, pursuant to which OVEC supplied the entire electrical requirements of the Facility from its coal-fired generating stations. At the time, the Facility required approximately 2,000 MW. Since going into cold stand-by mode in 2001, the Facility requires approximately 45 MW. The comprehensive power agreement was terminated in 2003, and OVEC currently provides power to the Facility under month-to-month contracts.

5. When shutting down the X533 switchyard, DOE Portsmouth deactivated all lower voltage equipment and relocated the high voltage lines outside of the X533 switchyard’s footprint. OVEC’s Sargents Substation is also located on the DOE Portsmouth reservation and DOE Portsmouth owns transmission lines that connect the switchyard to OVEC’s Marquis Substation. OVEC uses the X530 switchyard as a system tie point to transmit power across the OVEC system. According to DOE Portsmouth and OVEC,

⁸ NERC Registry Criteria at 7, section III(a).

approximately 450 MW of energy flows through the switchyard. DOE Portsmouth leases the Facility to the United States Enrichment Corporation (USEC).

C. July 2008 Order

6. In the July 2008 Order, the Commission approved NERC's registration of DOE Portsmouth as a transmission owner, transmission operator, and distribution provider. The Commission, however, expressed concern whether the record in the proceeding adequately supported NERC's determination that DOE Portsmouth is properly registered as a load-serving entity. Thus, the Commission remanded this issue to NERC for further consideration and directed NERC to submit either a revised registration determination supporting its determination or a notice that DOE Portsmouth should not be registered as a load-serving entity.⁹

7. The Commission presented the following concerns regarding DOE Portsmouth's registration as an LSE:

First, it is unclear whether DOE Portsmouth has any end-use customers. While the NERC registry decision states that "DOE secures energy through its contract with OVEC on behalf of the load at the DOE site," this statement is ambiguous. DOE Portsmouth claims that it is the end-use customer. DOE Portsmouth and OVEC argue whether USEC and [Uranium Disposition Services Corporation] are DOE Portsmouth's end-use customers. However, these arguments are not addressed in the registry decision and the correct answer is not evident from the pleadings in this proceeding. Further, it is not clear whether the NERC registry decision intends that DOE Portsmouth is a load-serving entity because it serves its *own* load. NERC's definition of load-serving entity, which applies to an entity serving its end-use customers, seems to exclude this scenario. In any case, without further elaboration by NERC, the Commission cannot determine this matter.

Moreover, while the NERC registry decision states that "DOE secures energy through its contract with OVEC" it is not clear to the Commission whether DOE Portsmouth's contract with OVEC is determinative that DOE Portsmouth is properly

⁹ July 2008 Order, 124 FERC ¶ 61,072 at P 48.

registered as a load-serving entity. Entering into bilateral contracts with a transmission and generation service provider for the procurement of power or seeking an alternate power supplier in a competitive market do not establish that DOE Portsmouth is a load-serving entity, as opposed to a service-taking customer. DOE Portsmouth's actions in determining its load profile when it solicits power could be viewed as consistent with the actions of a large industrial customer seeking to purchase transmission service and power from a service provider.¹⁰

II. NERC Registration Decision on Remand

8. On October 6, 2008, NERC submitted a "Board of Trustees Compliance Committee Decision on Remand" (Remand Decision) that affirmed NERC's earlier decision to register DOE Portsmouth as a load-serving entity.¹¹ NERC explains that, in developing the decision, it requested supplemental information and analysis from ReliabilityFirst, and NERC also requested that OVEC and DOE Portsmouth provide information to ReliabilityFirst.¹²

A. Supplemental Information

9. NERC states that OVEC confirmed "that the entire load at the DOE Portsmouth site . . . is served by [DOE Portsmouth] through its short-term, arranged power contract with OVEC."¹³ The Remand Decision also quotes OVEC as understanding that "USEC and other third parties are engaged in a variety of for-profit activities on the [DOE Portsmouth] site, as lessor or sub-lessor of property and buildings and/or as contractor or sub-contractor to [DOE Portsmouth], USEC or others on the site."¹⁴

¹⁰ *Id.* PP 51-52 (footnotes omitted).

¹¹ NERC Compliance Filing, Attachment A, Remand Decision.

¹² *Id.* at 2.

¹³ *Id.* (citing OVEC August 28, 2008 letter at 2, Attachment D to the NERC Remand Decision).

¹⁴ *Id.*

10. In its response to Reliability First's information request, OVEC describes the bidding process under its contract with DOE Portsmouth.¹⁵ OVEC reports that DOE Portsmouth provides it with an estimate of its load for the month, and OVEC solicits bids for the needed power, which is delivered using firm transmission service.

11. The Remand Decision discusses the supplemental information provided by DOE Portsmouth, in which DOE Portsmouth explains that electrical power for the site is supplied by OVEC pursuant to a 2003 Letter Agreement. DOE Portsmouth reports that, "in accordance with this letter agreement, OVEC solicits bids from third-party power providers for 'arranged power' on a month-to-month basis to meet the loads projected for the Portsmouth site."¹⁶ Bids are received by OVEC and communicated to DOE Portsmouth, which notifies OVEC of the bid that DOE Portsmouth desires to accept. OVEC then purchases and delivers the power to the site over OVEC's power lines. According to DOE Portsmouth, "[i]ncoming usage data is obtained from meters contained in the incoming power lines owned and maintained by OVEC."¹⁷

12. As reflected in the Remand Decision, DOE Portsmouth states that electricity delivered to the site is primarily used to conduct government operations at the site, including environmental remediation, maintenance, depleted uranium conversion, and cold shut down for its enrichment facilities.¹⁸ These operations are primarily carried out by contractors, with a small group of federal employees on site. In addition, DOE Portsmouth notes that it provides electrical power to the Ohio National Guard for servicing military equipment at no cost as part of a lease. Finally, DOE Portsmouth reports that a small portion of the electricity is used by USEC in support of its commercial uranium enrichment venture, known as the American Centrifuge Project, and that USEC pays DOE Portsmouth based on its actual monthly usage, as a *pro rata* share of site usage.¹⁹

13. The Remand Decision then recaps ReliabilityFirst's supplemental findings and recommendations. According to the Remand Decision, ReliabilityFirst concluded that

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3 (quoting DOE Portsmouth Sept. 5 response at 1-2, Attachment C to the NERC Remand Decision).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 4.

DOE Portsmouth “is responsible to provide services to USEC such as the provision of electric power as stated in the Memorandum of Agreement between [DOE Portsmouth] and USEC....”²⁰ ReliabilityFirst notes that “...USEC and [DOE Portsmouth] can charge each other for such electrical services which would result in a zero net basis” and states that it believes that this financial arrangement provides a basis for determining that DOE Portsmouth is a load-serving entity.²¹ The Remand Decision sets forth ReliabilityFirst’s conclusions regarding the power purchase arrangement between DOE Portsmouth and OVEC, after which ReliabilityFirst concludes that DOE Portsmouth “has ownership and responsibility for the equipment to deliver the secure power from the point of delivery” under the letter agreement with OVEC.²²

B. NERC Analysis

14. NERC states that, in response to the July 2008 Order, DOE Portsmouth is registered as a load-serving entity because it secures energy for third parties at the DOE Portsmouth site, and not because DOE Portsmouth secures energy for itself as the end-use customer. Referencing the supplemental information provided by DOE Portsmouth, NERC provides the following rationale:

[P]art of the electricity delivered to the site pursuant to the OVEC power agreement is used by an end-use customer, USEC Inc., in support of its commercial uranium enrichment venture ... under DOE-USEC lease. In addition, ... [DOE Portsmouth] also identifies other government contractors and entities at the site that similarly receive power procured by DOE under the OVEC power agreement to third party entities, including LPP, TPMC and UDS [LATA/Parallax Portsmouth, LLC; Theta Pro2Serve Management Co.; and Uranium Disposition Services, LLC]. According to [DOE Portsmouth], electrical power is typically supplied to the Government contractors as a Government Furnished Service or Item (GFSI). Moreover, [DOE Portsmouth] supplies electrical power to the Ohio National Guard’s maintenance and repair shop (an on-site shop leased by DOE to the Ohio

²⁰ *Id.* (quoting ReliabilityFirst’s September 19, 2008 findings, Attachment B to the NERC Remand Decision).

²¹ *Id.*

²² *Id.* at 5.

National Guard). These entities would also be classified as end-use customers.²³

Based on the supplemented record, NERC finds that DOE Portsmouth supplies power to third parties and, thus, is properly registered as a load-serving entity.

III. Notice of Filing, Interventions and Comments

15. Notice of NERC's Filing was published in the *Federal Register* with interventions and protests due on or before November 5, 2008. DOE Portsmouth and OVEC filed timely motions to intervene and comments. NERC filed an answer to DOE Portsmouth's comments on November 20, 2008,²⁴ and DOE Portsmouth filed an answer in response on November 26, 2008.

A. DOE Portsmouth Comments

16. DOE Portsmouth disputes NERC's finding that government contractors are third-party customers of the Federal government. DOE Portsmouth objects to the claim that its contractors and lessees are its end-use customers, arguing that such a position turns the relationship between a Federal agency and its contractors on its head. DOE Portsmouth states that it supplies the electricity to the site at no charge to the contractors in order to meet the Government's needs at the site, not to meet the needs of the contractors. According to DOE Portsmouth, the contractors do not therefore buy electricity at the site.²⁵ DOE Portsmouth argues that:

DOE [Portsmouth]'s contractors do not buy electrical services from DOE. ... DOE [Portsmouth] supplies electricity to its contractors to secure energy for the Government's needs at the site. NERC is incorrect in implying that in supplying electricity to its contractors, DOE [Portsmouth] is securing energy for needs other than its own."²⁶

²³ *Id.*

²⁴ As amended Dec. 1, 2008.

²⁵ DOE Portsmouth Comments at 2.

²⁶ *Id.* See also DOE Portsmouth Nov. 26, 2008 Answer at 1 n.1 (arguing that its government contractors should not be considered its end-use customers, because they receive electricity without charge as Government Furnished Services and Items, and they use the electricity solely for Government projects at a Government-owned site. DOE

17. In addition, DOE Portsmouth notes that NERC's analysis does not differentiate among DOE Portsmouth, USEC, and OVEC, all of whom could be said to be a load-serving entity by securing energy for the site. According to DOE Portsmouth, USEC secures electricity for an operations company, while OVEC secures electricity and transmission services for the site pursuant to the OVEC-DOE Portsmouth power agreement. DOE Portsmouth states that the impact of such a determination could have far reaching impacts on government procurement and administration.

B. OVEC Comments

18. OVEC supports the NERC determination and reiterates that under its agreement with DOE Portsmouth, once OVEC solicits bids for power, DOE Portsmouth chooses the winning bid and reimburses OVEC for the costs of such arranged power and energy. OVEC notes that USEC, the largest non-DOE entity on site, has itself awarded an engineering, procurement and construction services contract to Fluor Corp. for USEC's American Centrifuge Project.

C. NERC Answer

19. In response to DOE Portsmouth's comments, NERC states that nothing in the NERC registry criteria or Reliability Standards requires a customer to pay for electric energy that it receives. Instead, NERC states that the NERC registry criteria focus on the act of "securing energy and transmission service."²⁷ Furthermore, NERC states that by definition the third party contractors are, in fact, end-use customers of the energy secured and supplied by DOE Portsmouth, as the term is understood in the energy industry. According to NERC, a customer may consume the energy, but "there is no requirement that such entity also purchase the electric energy."²⁸ NERC responds to DOE Portsmouth's charge that it improperly singled out DOE Portsmouth by noting that it considered whether other entities should be the load-serving entity for the third-party contractors, but determined that DOE Portsmouth is properly registered as the load-serving entity. As to DOE Portsmouth's suggestion that such a holding could require many government installations to register, NERC notes that it registers entities on a case-by-case basis.

Portsmouth concludes that, in such circumstances, it should be considered the end-use customer).

²⁷ NERC Answer at 4.

²⁸ *Id.*

D. DOE Portsmouth Response

20. DOE Portsmouth's November 26, 2008 answer counters that payment is inherent in the meaning of "end-use customer" and argues that NERC provides no support for its claim that the registry criteria focus on the act of securing energy and transmission services or for its other proposed definitions of end-use customer. DOE Portsmouth suggests that NERC's explanation fits better with an "end-use *consumer*" as opposed to end-use customer. DOE Portsmouth also emphasizes that NERC has not explained why other entities are not load-serving entities in lieu of or in addition to DOE Portsmouth's designation. As for NERC's attempt to limit the potential impact of its determination, DOE Portsmouth states that failing to give consideration to the precedential effect of its decisions on other federal entities will hinder stable and predictable application and enforcement of the Reliability Standards.

IV. Discussion**A. Procedural Matters**

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²⁹ the timely, unopposed motions to intervene and notice of intervention serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure³⁰ prohibits an answer to an answer or protest unless otherwise permitted by the decisional authority. In this case, we find that DOE Portsmouth's and NERC's answers have assisted the Commission in its decision-making process.³¹ Therefore, we accept them.

B. Commission Determination

23. Based on review of the materials submitted in the Remand Decision and responsive pleadings, the Commission finds that NERC has failed to adequately support its assertion that DOE Portsmouth is properly registered as a load-serving entity. The Commission, therefore, grants DOE Portsmouth's appeal of NERC's registry determination.

²⁹ 18 C.F.R. § 385.214 (2011).

³⁰ 18 C.F.R. § 385.213(a)(2).

³¹ See, e.g., *Midwest Independent System Operator Corp.*, 121 FERC ¶ 61,132, at P 12 (2007); *Westar Energy, Inc.*, 121 FERC ¶ 61,108, at P 18 (2007).

24. As stated above, the Registry Criteria define a load-serving entity as an entity that “secures energy and transmission service (and related interconnected operations services) to serve the electrical demand and energy requirements of its end-use customers.” In the Remand Decision, NERC asserts that DOE Portsmouth is a load-serving entity because DOE Portsmouth procures energy to serve end-use customers. NERC cites USEC’s use of power under its lease with DOE Portsmouth, other contractors’ use of power, and the Ohio National Guard’s use of power for its vehicle repair shop.³²

25. DOE Portsmouth, however, maintains that it has no customers as it receives no payment from the contractors that take power on the DOE Portsmouth campus. DOE Portsmouth acknowledges that it supplies electricity to its contractors for the Government’s needs at the site, and that its contractors are third parties.³³ However, DOE Portsmouth contends that this does not make it a load-serving entity, nor make its contractors end-use customers, as DOE Portsmouth is simply providing power to its contractors at no cost as a “government furnished service.”

26. We agree based on the facts in this proceeding with DOE Portsmouth’s assertion that its procurement of electricity to meet the Government’s needs at the DOE Portsmouth site needs that are fulfilled by the operations of the contractors and lessees on the site does not make the contractors and lessees its customers and does not support registration as a load serving entity. DOE receives no payment from the contractors, other than compensation via lease payments, and these payments do not include a fee for service, but merely serve to allocate the costs of electricity to the various consumers on site.³⁴

27. DOE Portsmouth acknowledges that it supplies electricity to its contractors for the Government’s needs at the site, and that its contractors are third parties. However, the fact that third party contractors and lessees use power on the site is insufficient to establish that it is a load-serving entity under the Registry Criteria. The issue of who uses the power does not establish whether an entity has undertaken the responsibility to secure energy and transmission service in order to meet an obligation to provide electrical service to customers, consistent with the Registry Criteria definition of load-serving

³² NERC Remand Decision at 5.

³³ DOE Portsmouth Comments at 1 n.1 and 2.

³⁴ July 2008 Order at P 51 & n.28 (citing NERC Decision at 1, “Power consumed by individual facilities on site is metered by DOE. However, the metering is not used to sell power to others. Rather the metering is used to calculate each organization’s portion of the total DOE bill.”).

entity. This is true even though a portion of the power is used for profit by one of the lessees, USEC, the private company that was formed to undertake the enrichment activities that were formerly the direct responsibility of the Department of Energy. DOE Portsmouth secures energy to perform its statutory duties on the site, which include contracting out construction and operation of the facilities needed to perform its uranium enrichment activities, through its arrangements with USEC.

28. We conclude that the presence of USEC and its for-profit activities centered around the American Centrifuge Project does not convert DOE Portsmouth's procurement of electric service into an independent endeavor to provide or resell that service to the entities located on the DOE Portsmouth site. USEC reimburses DOE Portsmouth for the energy that DOE Portsmouth purchases from OVEC on a *pro rata* basis and DOE Portsmouth supplies this energy to USEC as the successor to the ongoing government activities on the site.

29. In its answer, NERC asserts that, despite the reference to customers, in the Registry Criteria, nothing in the Registry Criteria requires that an end use customer pay for the electrical energy that it receives, and instead argues that the Registry Criteria focus on securing energy and transmission service, which, according to NERC, DOE Portsmouth admits that it does.³⁵ NERC argues instead that it is sufficient that "the contractors are third party entities that are 'consuming' electric energy secured and supplied by [DOE Portsmouth] and they are 'not reselling' such electric energy. By definition, the third party contractors are, in fact, end-use customers of the electric energy secured and supplied by [DOE Portsmouth] as that term is well understood in the energy industry."³⁶

30. We disagree with NERC's reasoning. According to NERC, to establish that an entity is a load-serving entity under the Registry Criteria, it is only necessary to establish that the entity secures electric energy and transmission service that is consumed by an end user other than itself. NERC's reading would write out of its Registry Criteria the requirements that energy be secured "to serve the electrical demand and energy requirements of its end-use customers." We find that, under the facts in this proceeding, DOE Portsmouth's undertaking in its leases and operations contracts to ensure that electricity is available to the site for the use of the lessees is insufficient to establish that it has undertaken the responsibility to provide electric service to the lessees as a load serving entity. As discussed above, DOE Portsmouth merely ensures that the proper arrangements are in place with an entity that is able to provide such service, — in this

³⁵ NERC Answer at 4.

³⁶ *Id.*

case OVEC, the special purpose entity that was incorporated in 1954 to serve the DOE Portsmouth load.

31. The Commission notes that no party has alleged that DOE Portsmouth is eligible to be or become a competitive electric service supplier under Ohio law. This fact supports our finding, because it shows that DOE Portsmouth did not seek out the lessees and contractors in order to provide them with electric service, nor did it undertake the responsibility to serve the load as a retail service provider. Thus, under Ohio law OVEC must serve the load, and DOE Portsmouth must contract with OVEC for retail electric service.³⁷ We also note that OVEC reports that it has no transmission customers, as would be the case if DOE Portsmouth were procuring power to serve load other than through its bundled retail service agreement with OVEC.³⁸

32. For the reasons discussed above, we are not persuaded by the record that DOE Portsmouth is properly registered as a load-serving entity. Based on this record, we grant DOE Portsmouth's appeal as to this issue and remand the matter to NERC for additional proceedings to reflect our decision, as indicated below.

33. In addition, we believe that the record in this proceeding as well as other publicly available information points to OVEC as the load-serving entity for the DOE Portsmouth load. The record in this proceeding indicates that OVEC serves the DOE Portsmouth load under a retail service agreement that has been approved by the Ohio PUC. As discussed above, we find that the lessees and contractors performing work at the site are not DOE Portsmouth's behind the meter electric service customers. That leaves DOE Portsmouth as the customer for the load, with OVEC as the entity that procures energy and transmission service to provide electric service to this customer. OVEC purchases the energy for the DOE Portsmouth load from the bidders provided for in the letter agreement; OVEC owns and operates a transmission system and uses its transmission facilities to transmit the power purchased from the bidding suppliers across its system to

³⁷ We note that under Ohio law, DOE Portsmouth cannot participate in the retail restructuring program, due to a finding that OVEC does not have a "service territory," having instead DOE Portsmouth as its sole retail customer. *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code.*, PUC Ohio, Finding and Order, Case No. 99-1141-EL, at 4-5 (Nov. 30, 1999) (approving OVEC request for determination that it need not file restructuring plan).

³⁸ OVEC Open Access Transmission Tariff, Attachment M, Transmission Planning Process, Sheet No. 404, Docket No. OA08-19-000 (filed Dec. 7, 2007) (Attachment M Filing).

deliver the energy to DOE Portsmouth. As we noted in the July 2008 Order, OVEC was formed for the express purpose of supplying the electric power requirements of DOE Portsmouth, and OVEC describes DOE Portsmouth as its sole bundled retail customer served under the short-term, arranged power service agreement approved by the Ohio PUC.³⁹ In addition, we note that the OVEC OASIS reflects the DOE Portsmouth load as native load.⁴⁰

34. Although OVEC has intervened and provided comments, the subject of the immediate proceeding is NERC's registration of DOE Portsmouth as a load-serving entity, not OVEC. Thus, while we believe that these facts support registration of OVEC as a load-serving entity, we will not make any conclusions regarding OVEC in this proceeding. Rather, we direct NERC to either register OVEC as the load-serving entity through the NERC compliance registration process or submit a filing within 90 days showing cause why OVEC should not be registered as a load-serving entity.⁴¹

The Commission orders:

(A) The Commission hereby grants DOE Portsmouth's appeal of NERC's registration determination with regard to the load-serving entity function, as discussed in the body of this order.

³⁹ July 2008 Order, 124 FERC ¶ 61,072 at P 52 n.29 (citing OVEC Attachment M Filing, Sheet No. 404); *see also* OVEC Application for Approval of Second Modification to a Letter Agreement, Public Utilities Commission of Ohio, Case No. 08-1100-EL-AEC, at para. 2 (Sep. 19, 2008) (noting that OVEC was organized for the purpose of providing electric service to the DOE Portsmouth facility).

⁴⁰ OVEC described DOE Portsmouth's average load as 29 MW (July 2008 Order at P 33); OVEC's OASIS reported 29.75 MW of native load on Jul. 10, 2008. The NERC glossary defines Native Load as "The end-use customers that the Load-Serving Entity is obligated to serve."

⁴¹ The NERC Rules of Procedure, Appendix 5A, Organization Registration and Certification Manual, section III, Organization Registration Process, at p. 5, para. 1(b) (effective Jan. 2012) provides that the Commission, as the applicable governmental authority, may initiate a registration process for an entity. *See also* the NERC Rules of Procedure, sections 501.1.2-1.5, and Registry Criteria at 1 n.2 (providing that an organization may be added to or removed from the compliance registry at any time upon a recommendation to the director of compliance, with supporting reasons).

(B) The Commission hereby directs NERC to remove DOE Portsmouth's registration as a load-serving entity from the NERC Compliance Registry, as discussed in the body of this order.

(C) The Commission hereby remands this matter to NERC to either register OVEC through the NERC compliance registration process or submit a filing within 90 days showing cause why OVEC should not be registered as a load-serving entity, as discussed in the body of this order.

By the Commission. Commissioner Norris is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

U.S. Department of Energy,
Portsmouth/Paducah Project Office

Docket No. RC08-5-001

(Issued April 19, 2012)

NORRIS, Commissioner, *dissenting*:

In today's order, the Commission overturns the decision of the North American Electric Reliability Corporation (NERC) Board of Trustees Compliance Committee and ReliabilityFirst to register the United States Department of Energy, Portsmouth/Paducah Project Office (DOE Portsmouth) as a load serving entity under the NERC Statement of Compliance Registry Criteria (Registry Criteria). Because I do not believe that the Commission makes a compelling case to overturn the judgment of NERC and ReliabilityFirst on this matter, and because I am concerned about the potential long-term ramifications of the Commission's approach for the Compliance Registry program, I respectfully dissent.

To address the Commission's specific inquiries in its previous remand,¹ NERC and ReliabilityFirst engaged in extensive further process to gather additional evidence and analysis.² Based on this additional evidence and analysis, NERC explained in part in its remand decision that it registered DOE Portsmouth as a load-serving entity not because it secures energy for itself as an end use customer, but rather because it secures energy for third parties at the DOE Portsmouth site.³ No one appears to dispute that DOE Portsmouth itself does not consume all of the electricity it receives from Ohio Valley Electric Corporation (OVEC), and that there are third-party end users on the DOE Portsmouth site that receive their electricity from DOE Portsmouth.

¹ *U.S. Department of Energy, Portsmouth/Paducah Project Office*, 124 FERC ¶ 61,072 (2008). The Commission specifically sought information on "whether DOE Portsmouth, in fact, procures energy to serve end-use customers, as set forth in NERC's definition of load-serving entity." *Id.* P 50-54.

² See NERC Compliance Filing, Attachment A, Remand Decision at 2-5.

³ *Id.* at 5.

Instead, the Commission overturns the registry determination made by NERC and ReliabilityFirst, after two separate efforts to analyze DOE Portsmouth's circumstances, based on little more than a single factor: whether and how DOE is paid for the energy it distributes to the end users on its site. Today's order fails to convincingly explain why this sole factor is sufficient to overturn the determination of NERC and ReliabilityFirst that DOE Portsmouth's normal functions in securing energy for third parties at the DOE Portsmouth site make it a load-serving entity under the definition and thresholds in the Registry Criteria.

For example, today's order states that the issue of who uses power is insufficient to establish whether an entity has undertaken the responsibility to secure energy and transmission service to meet an obligation to provide electrical service to customers.⁴ While that issue may not alone be determinative, the majority's sweeping statement is difficult to reconcile with the fact that for an entity to be considered a load-serving entity, both under the NERC Registry Criteria definition and as that term is commonly understood, someone other than that entity must use the power it procures.⁵

In addition, the Commission offers no compelling rationale, based on reliability or other considerations, to overturn NERC's reasoning that nothing in the Registry Criteria limits the term "end-use customer" in the load-serving entity definition to only those that pay for the electrical energy they receive.⁶ Today's order suggests that NERC's reasoning would "write out" portions of the Registry Criteria definition of load-serving entity.⁷ However, the order simply does the opposite, reading a payment requirement into the definition without sufficient justification.

Further, the Commission reaches outside the record to considerations such as whether DOE Portsmouth could become a retail electric service provider under Ohio law, or whether DOE Portsmouth should be considered a transmission customer under OVEC's FERC-jurisdictional OATT.⁸ The Commission's order never explains, however,

⁴ *U.S. Department of Energy, Portsmouth/Paducah Project Office*, 139 FERC ¶ 61,054 at P 27 (2012).

⁵ *See* Answer of NERC at 4.

⁶ *Id.* at 4-5.

⁷ *U.S. Department of Energy, Portsmouth/Paducah Project Office*, 139 FERC ¶ 61,054 at P 30.

⁸ *Id.* at P 31.

why NERC can or should include these considerations in its compliance registry determinations.

I'm also concerned that the Commission's decision to overturn NERC and ReliabilityFirst here, based on a single factor, ignores other potentially relevant factors. For example, today's order does not address the fact that DOE Portsmouth has entered into an agreement with OVEC to deliver power over OVEC's transmission lines to the site, and that DOE Portsmouth is responsible for scheduling power under its agreement with OVEC. These facts are relevant to whether DOE Portsmouth normally performs the function of "[s]ecur[ing] energy and transmission service (and related interconnection operations services)" for end-users at the site, consistent with the Registry Criteria definition of load serving entity. Further, the record shows that DOE Portsmouth "has ownership and responsibility for the equipment to deliver the secure power from the point of delivery", *i.e.*, to distribute the power to end-users at the site.⁹ The ownership and control of distribution facilities would seem relevant to a determination of load-serving entity status, but is not addressed in today's order.¹⁰

Without question, DOE Portsmouth presents a unique set of circumstances, making it a close question as to how it should be treated under the NERC Registry Criteria. In such circumstances, I believe it is inappropriate to overturn a NERC registry determination without a more compelling rationale.

Today's order also raises broader questions for me regarding how the Commission should approach compliance registry appeals, particularly in unique circumstances where NERC must make difficult technical judgment calls based on the evidence before it. Here, the Commission approaches DOE Portsmouth's appeal by conducting a broad *de novo* type review, and ultimately reverses NERC based on its own view of one relevant factor, while giving no weight to the many other relevant factors NERC must take into account under the Registry Criteria. I'm concerned that such an approach is not sustainable, and will result in inefficient and ineffective administration of the NERC Compliance Registry program.

⁹ See NERC Remand Decision at 5 (summarizing ReliabilityFirst's supplemental findings and recommendations).

¹⁰ See, *e.g.*, *Direct Energy Services, LLC*, 125 FERC ¶ 61,057 at P 24-25 (2008) (finding it reasonable to register a distribution provider as the load-serving entity for all load directly connected to its distribution facilities, given that "distribution providers have both the infrastructure and access to information to enable them to comply with the Reliability Standards that apply to [load-serving entities]").

Pursuing a broad, *de novo* type review and ultimately substituting the Commission's judgment for NERC's in a close case like this one, where reasonable minds can certainly differ as to the correct outcome, has the potential to undermine NERC's ability to make initial determinations on registry status and administer the Compliance Registry program. It can also create uncertainty in the application of the Registry Criteria by NERC.

Further, sending a signal that the Commission will always "start over" in each registry appeal may encourage more appeals from registered entities, even in cases that are not as close as this one, potentially slowing down the registration process and creating uncertainty as to the registry status of entities involved in those appeals. This proceeding is itself compelling evidence of the potential for delay and uncertainty to result from frequent appeals to the Commission. ReliabilityFirst initially registered DOE Portsmouth on August 31, 2007, and after extensive work to resolve the issues (including a remand from NERC to ReliabilityFirst to work with the parties to find a resolution), NERC first ruled on DOE Portsmouth's challenge to its registration on April 22, 2008.¹¹ Nearly four years later, we are returning this matter to NERC and ReliabilityFirst for a second time, leaving continued uncertainty as to who should be registered as the load-serving entity for load at the DOE Portsmouth site.

Given the large number of registered entities and the large number of registry decisions that must be made,¹² the Commission should avoid "second-guessing" NERC's registry decisions. Pursuing an approach that encourages a greater number of registry determinations to be brought to our doorstep for a second bite at the apple will likely prove unworkable. Commission and public resources would be better spent ensuring that NERC makes reasoned compliance registry decisions that are supported by the available evidence, and provides registered entities with due process when they challenge registry decisions.

For these reasons, I respectfully dissent.

John R. Norris, Commissioner

¹¹ See NERC Remand Decision at 1.

¹² NERC states that there are currently approximately 1,400 registered entities. See <http://www.nerc.com/page.php?cid=1|9>.

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