

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

**CONSTELLATION ENERGY** ) **Docket No. RC08-7-000**  
**COMMODITIES GROUP, INC.** )

**MOTION TO INTERVENE AND COMMENTS  
OF THE  
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION**

Pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 385.212 and 385.214, the North American Electric Reliability Corporation ("NERC") hereby moves to intervene and submits these comments in the above-referenced proceeding.

**I. INSTANT APPEAL**

On July 11, 2008, Constellation Energy Commodities Group, Inc. ("Constellation") filed an appeal of the May 22, 2008 decision ("Decision") rendered by NERC's Board of Trustees Compliance Committee ("BOTCC") to include Constellation on the NERC Compliance Registry within the Texas Regional Entity Region ("Texas RE") for the function of Generator Operator ("GOP"). The NERC BOTCC Decision to include Constellation on the NERC Compliance Registry should be affirmed.

**II. PROCEDURAL HISTORY**

On May 4, 2007, Constellation filed an appeal of its GOP registration in the Texas RE Region ("Constellation Appeal"). On June 14, 2007, Constellation filed a supplement to its appeal ("Constellation Supplemental Appeal"). On October 3, 2007, Texas RE

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provided its detailed basis for including Constellation on the NERC Compliance Registry (“Texas RE October Assessment”). On October 19, 2007, Constellation provided its response to Texas RE’s Assessment (“Constellation’s Response”). On October 21, 2007, the NERC Board of Trustees Compliance Committee considered the appeal filed by Constellation, Texas RE’s Assessment and Constellation’s Response, in accordance with the provisions of Rule 501 of NERC’s Rules of Procedure.

On October 22, 2007, the NERC Board of Trustees Compliance Committee issued a decision remanding Constellation’s appeal back to Texas RE to work with Power Resources, Ltd. (“PRL”) and Constellation to resolve the registration dispute and to determine if a Joint Registration Organization (“JRO”) agreement would provide a suitable mechanism for resolution. Subsequently, Texas RE also registered PRL as a GOP. Discussions between Texas RE, Constellation and PRL ensued after the issuance of the decision on remand. However, Constellation and PRL were unable to reach agreement on the development of a JRO. On January 21, 2008, Texas RE informed NERC that Constellation and PRL each share GOP responsibilities with respect to the PRL Facility<sup>1</sup> and given their inability to reach agreement on the division of responsibilities and liabilities each should be registered as the GOP for the Project to avoid a gap in reliability.

On February 1, 2008, PRL filed an appeal of its GOP registration (“PRL Appeal”), and on February 15, 2008, PRL provided supplemental information in support of its appeal (“PRL Supplemental Appeal”). PRL opposes being solely registered as a

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<sup>1</sup> Specifically, this is PRL’s gas-fired, combined-cycle electrical generation facility (the “PRL Facility” or “Project”) located in Howard County, Texas. Notably, there is no dispute that the PRL Facility at issue here meets the criteria set forth in section III.c, which underlies the registration of PRL as a Generator Owner (“GO”) and PRL and Constellation both as a GOP on the NERC Registry.

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GOP and concurrently registered with Constellation as a GOP but expresses support for a JRO which clearly delineates and divides compliance responsibilities and liabilities between PRL and Constellation. On February 14, 2008, Constellation responded to Texas RE's January notification objecting to any form of registration, joint or otherwise, that would require it to be a GOP for the Project. Constellation also requested that NERC deny Texas RE's request to hold Constellation's appeal in abeyance and act expeditiously to grant Constellation's appeal and remove Constellation from the NERC Compliance Registry as the GOP for the Project.

On March 7, 2008, Texas RE responded to the submittals of Constellation and PRL and requested that NERC consolidate the Constellation appeal and the PRL appeal for determination and that, upon final consideration, NERC confirm the concurrent GOP registrations of Constellation and PRL for the Project ("Texas RE March 7 Assessment"). Although Texas RE expressed its belief that a JRO would be the best solution in this case, Texas RE advised NERC that Constellation and PRL had not been able to reach an agreement and the NERC Rules of Procedure do not allow Texas RE to compel a JRO. Therefore, Texas RE asserted that NERC should affirm the concurrent registration to ensure that there is no gap in responsibility within the GOP function.

On March 25, 2008, Constellation responded to Texas RE's March 7 concurrent registration determination, objecting to Texas RE's Assessment and urging NERC to grant Constellation's appeal and remove Constellation from the Compliance Registry ("Constellation March 25 Response"). Constellation expresses support for the development of a JRO whereby PRL is the sole GOP, although Constellation would agree to perform communications services on behalf of PRL as it does as a Qualified

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Scheduling Entity (“QSE”) under the ERCOT Protocols. On March 25, 2008, PRL responded to Texas RE’s March 7 Assessment (“PRL March 25 Response”). PRL supported Texas RE’s request for consolidation of the Constellation and PRL appeals proceedings and stated that PRL is willing to enter into a properly structured JRO with several liability. However, PRL states that the present concurrent registration arrangement is an inappropriate solution and that NERC should consider, support, and if necessary, compel the parties to enter into an alternative JRO. In addition, PRL and Constellation provided a confidential and redacted copy of the parties’ Tolling Agreement.

On March 27, 2008, Texas RE responded to Constellation’s March 25 submittal stating that Constellation should continue to be registered as the GOP, based upon the responsibilities and duties to which Constellation agreed in the MP Agreement to operate in the ERCOT Region (“Texas RE March 27 Response”). In addition, Texas RE stated that PRL should also remain concurrently registered for the GOP function in order to avoid a reliability gap. Texas RE did not provide an independent analysis of the redacted Tolling Agreement, which was provided to Texas RE and NERC after Texas RE’s March 7 Assessment had been submitted to NERC.

On May 5, 2008, the NERC Board of Trustees Compliance Committee considered the appeals filed by PRL and Constellation, Texas RE’s assessments and PRL’s and Constellation’s Responses, in accordance with the provisions of Rule 501 of NERC’s Rules of Procedure. On May 22, 2008, the NERC BOTCC issued its Decision upholding Texas RE’s determination to concurrently register Constellation and PRL as a GOP. Subsequently, Constellation requested an extension of time for the filing of its appeal to

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the Commission to allow the parties more time to seek to negotiate a mutually agreeable JRO. The NERC BOTCC granted the extension. However, Constellation and PRL were unable to reach agreement. Constellation thereafter appealed the May 22, 2008 Decision to the Commission. PRL did not.

**III. NOTICES AND COMMUNICATIONS**

Notices and communications with respect to this filing may be addressed to:

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**IV. MOTION TO INTERVENE**

NERC was formed to serve as the electric reliability organization (“ERO”) authorized by Section 215 of the Federal Power Act (“FPA”). NERC was certified as the ERO by the Commission’s Order issued July 20, 2006, in Docket No. RR06-1-000.<sup>2</sup> NERC’s mission is to improve the reliability and security of the bulk power system in North America. To achieve that, NERC develops and enforces reliability standards; monitors the bulk power system; assesses future adequacy; audits owners, operators and users for preparedness; and educates and trains industry personnel. NERC is a self-

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<sup>2</sup>*Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 61,062 (2006).

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regulatory organization that relies on the diverse and collective expertise of industry participants. As the ERO, NERC is subject to oversight by the Commission and applicable governmental authorities in Canada.

On April 19, 2007, the Commission approved delegation agreements between NERC and eight Regional Entities, including a delegation agreement between NERC and Texas RE.<sup>3</sup> Pursuant to a delegation agreement, NERC delegated to Texas RE the authority to enforce mandatory Reliability Standards within the Texas RE region.

On June 18, 2007, the NERC reliability standards, approved in Order No. 693, became mandatory and enforceable in the United States for all owners, operators and users of the bulk power system.<sup>4</sup> Also, in Order No. 693, the Commission approved NERC's Compliance Registry process, including NERC's *Statement of Compliance Registry Criteria (Registry Criteria)*. The *Registry Criteria* describes how NERC and the Regional Entities identify organizations that should be registered for compliance with the mandatory Reliability Standards. NERC has delegated the responsibility to the Regional Entities, including Texas RE, to identify the organizations subject to inclusion on the NERC Compliance Registry. NERC provides notice of registration to all organizations included on the NERC Compliance Registry.

Section 500 of the NERC *Rules of Procedure* sets forth the process for an entity to challenge its inclusion on the NERC Compliance Registry. The NERC BOTCC issues a decision on such appeals. Once that decision has been rendered, an entity may file an appeal with the Commission.

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<sup>3</sup> *North American Electric Reliability Council, North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

<sup>4</sup> *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 72 Fed. Reg. 16,416 (April 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2007), *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

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Because the instant appeal has been filed with the Commission, NERC has a substantial and direct interest in the Commission decision in this proceeding. No other party can adequately represent NERC's interest. Therefore, it is in the public interest to permit this intervention.

**V. COMMENTS**

Contrary to the assertions of Constellation, the NERC BOTCC Decision is based on a straightforward application of the NERC Registry Criteria. In finding that Constellation is properly registered as a GOP, the NERC BOTCC considered the evidence and arguments before it and explained the bases for its findings and conclusions consistent with the NERC Registry Criteria, NERC Rules of Procedure and applicable Commission rules, regulations and orders. Constellation's claims that the NERC BOTCC Decision ignored the record is directly refuted by the fact that the Decision is replete with citations to the underlying record, clearly evidencing a reasoned decision based upon the specific facts and circumstances before the NERC BOTCC. The Decision is consistent with Section 215 of the FPA and Commission precedent thereunder. Constellation's claims to the contrary are without merit, and the Commission should affirm the NERC BOTCC Decision.

With respect to the merits of Constellation's appeal before FERC, there is significant overlap and repetition in the filing. Simply put, Constellation objects to concurrent registration on the following grounds:

- Constellation claims that it does not meet the NERC *Registry Criteria* for GOP registration.
- While Constellation concedes that it has agreed to perform certain communications activities on behalf of the PRL Facility, Constellation asserts that it has not agreed to assume GOP responsibilities in the NERC

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Reliability Standards under the terms of the Tolling Agreement or the Market Participant Agreement. In any event, Constellation argues that its ability to perform is dependent on performance by PRL. As a corollary, Constellation argues that there is no reason to merge the QSE and GOP obligations.

- Constellation argues that concurrent registration is inappropriate and is only warranted under extreme or extraordinary circumstances, which it claims are not present here.
- Constellation contends that the NERC BOTCC Decision is inconsistent with its registrations in other Regions.
- **[BEGIN CONFIDENTIAL INFORMATION, which has been removed from the public filing**

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Each of these issues is addressed in turn. For the reasons set forth below, the Commission should deny Constellation's appeal and should uphold concurrent registration of Constellation as a GOP for the PRL Facility.

- 1. The NERC Registry Criteria and Applicable Reliability Standards Require the Concurrent Registration of Constellation as GOP for the PRL Facility.**
  - a. Constellation errs in concluding that it does not meet the NERC Registry Criteria for GOP registration.**

Constellation's contention that it does not own any physical assets for the generation, transmission, or distribution of electric power and has no retail electric customers or service territories is wholly irrelevant<sup>5</sup> with respect to whether it should be registered in the Texas RE region concurrently with PRL as a GOP for the PRL Facility. Section II of the *Statement of Compliance Registry Criteria (Rev. 4.0) (Registry Criteria)* defines a GOP as "[t]he entity that operates generating unit(s) and performs the functions

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<sup>5</sup> Constellation FERC Appeal at 2.



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of supplying energy and interconnected operations services.” The *Registry Criteria* does not require ownership of any assets, retail end-use customers or a service territory with respect to a GOP.

Constellation seemingly latches on to the GOP exclusion language, which explains when a JRO is appropriate,<sup>6</sup> set forth in the *Registry Criteria* to argue that it has not voluntarily agreed to accept responsibility for compliance with approved NERC Reliability Standards and requirements thereunder. However, where an entity actually performs and has assumed responsibility for activities that are governed by the NERC Reliability Standards, such an entity cannot unilaterally opt out of compliance.

As the Commission held:

The intent was to allow flexibility in identifying the actual user, owner or operator of the Bulk-Power System that would be responsible for complying with the Requirements in the Reliability Standards. . . Such joint registration must assure that there is no overlap between the decisionmaking and implementation functions, i.e., that there are not two sets of hands on the wheel. Again, our intent is to ensure that there is neither redundancy nor gap in responsibility for compliance with the Requirements of a Reliability Standard, while allowing entities flexibility to determine how best to accomplish this goal.<sup>7</sup>

Here, there is no overlap in decision-making or implementation functions, rather the relationship is symbiotic. Clearly, it is preferable for Constellation to ensure that its existing and future agreements clearly address such compliance responsibility. Based upon a review of the relevant facts and circumstances, NERC and the Regional Entities have plenary authority to register an entity that performs activities governed by and

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<sup>6</sup> An exclusion to these criteria provides, in relevant part, that:

A generator owner/operator will not be registered based on these criteria if responsibilities for compliance with approved NERC reliability standards or associated requirements including reporting have been transferred by written agreement to another entity that has registered for the appropriate function for the transferred responsibilities, such as a load-serving entity, G&T cooperative or joint action agency as described in Sections 501 and 507 of the NERC Rules of Procedure.

<sup>7</sup> Order No. 693 at P 143.

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subject to the NERC Reliability Standards, even where the entity does not voluntarily agree to be subject to the Reliability Standards.

In finding that Constellation is a GOP, it was necessary for the NERC BOTCC to consider not only the *Registry Criteria* definition but also the specific activities Constellation performs and how they relate to the NERC Reliability Standards. Indeed, neither PRL nor Constellation provided the Tolling Agreement to the NERC BOTCC or Texas RE in their respective appeals, although both cited it liberally, until NERC requested it. While Constellation claims that NERC BOTCC did not consider its citations or arguments as to specific provisions in the Tolling Agreement,<sup>8</sup> Constellation is wrong. The NERC BOTCC Decision pointed to language notably ignored by Constellation that supported NERC's determination that concurrent registration was appropriate.<sup>9</sup>

In the context of other registration appeals, the Commission has made clear that NERC should consider agreements under which parties purportedly accept contractual responsibility for the functional activities that it performs. Constellation can hardly deny that it is through the Tolling Agreement that Constellation has "accepted contractual responsibility for the [generator] operator activities that it performs."<sup>10</sup>

Constellation accurately notes the Commission's position that there is a difference between responsibility for ensuring performance of GOP Requirements and the actual performance of GOP Requirements.<sup>11</sup> NERC agrees. However, NERC does not agree with Constellation's implicit suggestion that if parties refrain from explicitly referencing

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<sup>8</sup> Constellation FERC appeal at 8, 27-28

<sup>9</sup> NERC BOTCC Decision at 16-17.

<sup>10</sup> *Southeastern Power Administration*, 122 FERC ¶ 61,140 at P 23 (2008).

<sup>11</sup> Constellation FERC appeal at 30.

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the NERC Reliability Standards they can somehow evade any resultant compliance obligations. As applied here, Constellation has solely assumed responsibility of ensuring performance of its communications activities that are subject to GOP Requirements and has agreed to actually perform those communications activities.

Because Constellation refuses to acknowledge that it has voluntarily contracted to accept responsibility for certain communications activities and because no JRO was reached,<sup>12</sup> the symbiotic relationship of PRL and Constellation under the provisions of those agreements requires the concurrent registration of Constellation and PRL. The nature of this relationship is set forth not only in the Texas RE Assessment but also was addressed in the NERC BOTCC Decision and is not repeated here. Indeed, even Constellation provides ample examples where each entity must rely upon the actions of the other to comply with applicable Reliability Standards. NERC notes that there is no claim that two hands would be at the wheel, nor does the record support such a finding with respect to concurrent registration here.

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<sup>12</sup> The NERC Rules of Procedure sections 501.1.2.7, 507.2 and 507.6 state that, with respect to a Joint Registration Organization, the members must accept the reliability functions they will be responsible for, that the agreement must clearly specify the parties' responsibilities, and that annually the JRO shall provide to the Regional Entity a list that identifies the members or related entities and the functions for which the JRO has registered on behalf of the members.

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- b. While Constellation concedes that it has agreed to perform certain communications activities on behalf of the PRL Facility, Constellation asserts that it has not agreed to assume GOP responsibilities under the Tolling Agreement or the Market Participant Agreement. In any event, Constellation argues that its ability to perform is dependent on performance by PRL. As a corollary, Constellation argues that there is no reason to merge the QSE and GOP obligations.**

The Tolling Agreement governs PRL's sales and Constellation's purchases of electric generation capacity and electric energy, including all ancillary products and services marketable in the ERCOT transmission area from the PRL Facility, included as Confidential Attachment M in Constellation's Appeal. Under the Tolling Agreement, Constellation agreed to be the QSE for the PRL Facility. Constellation also signed a Standard Form Market Participant Agreement with the ERCOT ISO.<sup>13</sup>

Constellation does not dispute that it has agreed to perform and is responsible for performing certain communications activities on behalf of the PRL Facility. Constellation also acknowledges that the communication tasks that Constellation performs as QSE "arguably overlap" certain tasks that are required of a GOP.<sup>14</sup> In fact, Constellation has even conceded that it is undertaking activities that ensure compliance with the GOP Reliability Standards.<sup>15</sup>

Constellation's rigid position is that it does not physically "operate" the PRL Facility and should not be registered as a GOP. The argument falls flat. Constellation misapprehends the *Registry Criteria* and the relevance of the obligations it has assumed by contract under the Tolling Agreement and the Market Participant Agreement. By contractually agreeing to serve as the sole QSE for the PRL Facility, Constellation has

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<sup>13</sup> Constellation FERC appeal at 2-3.

<sup>14</sup> Constellation FERC appeal at 38.

<sup>15</sup> Constellation March Response to TRE's March 7 Response at 22-23 n.58. *See, e.g.*, Constellation FERC appeal at 10, 12-13, 34 and 38.

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committed to perform communications services, which are subject not only to ERCOT Protocols but also to the NERC Reliability Standards. In addition, Constellation has authority to direct the operations of the PRL Facility, subject to certain provisions.<sup>16</sup> As the NERC BOTCC Decision observes:

As the excerpts from the PRL and [Constellation] pleadings make clear, while PRL physically operates the facility, it does so pursuant to directives of [Constellation].<sup>17</sup>

Thus, it is disingenuous for Constellation to claim that it does not engage in “operations” with respect to the PRL Facility.<sup>18</sup>

Significantly, under the NERC Reliability Standards, a GOP not only physically operates the facility, it also performs communications services with respect to the facility. While Constellation argues that the NERC Rules of Procedure and *Registry Criteria* could be read to require that only one entity can ever perform a given function subject to the Reliability Standards,<sup>19</sup> such a position is belied by Sections 501 and 507 of the NERC Rules of Procedure as well as Order No. 693. Notably, this is belied by Constellation’s own JRO in the ERCOT region whereby it has contractually assumed compliance obligations with respect to a number of Reliability Standards.

As Constellation notes, while the Tolling Agreement and Market Participant Agreement clearly delineate the parties’ responsibilities, the agreements contain no reference to the NERC Reliability Standards. The absence of an explicit reference to the NERC Reliability Standards in those agreements have led to PRL and Constellation both pointing to the other as contractually obligated to serve as the GOP. Accordingly, it was

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<sup>16</sup> Constellation acknowledges that it has certain power purchase rights, fuel supply obligations and scheduling rights under the Tolling Agreement. Constellation FERC appeal at 51-53.

<sup>17</sup> NERC BOTCC Decision at 16. *See also id.* at 5-12.

<sup>18</sup> Constellation FERC appeal at 13.

<sup>19</sup> Constellation FERC appeal at 32.

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and is both necessary and appropriate for NERC and FERC to evaluate the contractual commitments assumed by Constellation to determine if the activities it solely performs fall within the purview of the NERC Reliability Standards. Such an approach is consistent with NERC's responsibility to ensure that actual operators, owners and users of the bulk power system are held accountable to relevant Reliability Standards.

While Texas RE initially only registered Constellation as the GOP for the PRL Facility, the NERC BOTCC remanded Constellation's appeal to allow Texas RE, PRL and Constellation to explore the development of a JRO agreement. During the course of the discussions, Texas RE determined that, because of the symbiotic relationship of PRL and Constellation in fulfilling obligations under the NERC Reliability Standards, it was appropriate to concurrently register PRL and Constellation as a GOP. Texas RE also determined that the parties' respective responsibilities were clearly addressed in the parties' agreements – a fact that Constellation does not dispute. While the parties reached an impasse in discussions regarding the development of a JRO, the NERC BOTCC ruled on the merits of the Constellation and the later filed PRL appeal. Based upon its thorough review of the evidence and arguments before it, the NERC BOTCC upheld Texas RE's concurrent registration of PRL and Constellation. While PRL has not appealed the NERC BOTCC Decision to FERC, Constellation has. Many of the arguments now before the Commission were addressed in the NERC BOTCC Decision. Based upon a review of Constellation's FERC appeal, NERC continues to believe that concurrent registration is warranted.

Constellation also contends that: (1) under the existing agreements, if PRL does not provide Constellation with the requisite information, Constellation cannot

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communicate it; and (2) it has no ability or authority to act on communications that it receives from Responsible Entities. NERC's registration of Constellation as a GOP does not alter the contractual obligations of the parties in the Tolling Agreement or the Market Participant Agreement. **[BEGIN CONFIDENTIAL INFORMATION which has been removed from the public version**

<sup>20</sup> **END**

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Constellation also objects to the position of NERC and Texas RE that as the QSE for the PRL Facility, only Constellation can communicate with the ERCOT ISO with respect to GOP Reliability Standards. In support of its claim, Constellation points to the obligation of PRL as a GO to communicate certain information to the ERCOT ISO. The NERC GO Reliability Standards are not at issue here. With respect to the GOP

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Reliability Standards, Texas RE has made clear that only the QSE can communicate certain information to the ERCOT ISO. Constellation's example is inapposite.

Constellation's claim that it has no ability or authority to comply with or ensure compliance with any entire Requirement is disingenuous. The fact that Constellation has the ability or authority to comply with any element of a Requirement in a Reliability Standard is sufficient to justify its registration. Constellation's argument also is undermined by the fact that it has entered into a JRO with a third party and has assumed responsibility for certain Reliability Standard Requirements.<sup>21</sup>

**2. Concurrent Registration Is Appropriate Here.**

NERC generally agrees with Constellation that non-voluntary concurrent registration is appropriate where: (1) parties "have very clearly separated *responsibility*" for activities that fall under the Reliability Standards, and (2) "absent a voluntary agreement on joint responsibility, there will be a clearly identifiable and significant gap in responsibilities under the Reliability Standards if both are not registered."<sup>22</sup> However, NERC disagrees with Constellation that extreme or extraordinary circumstances are required to support concurrent registration.<sup>23</sup> Indeed, as the NERC BOTCC Decision makes clear, and contrary to Constellation's position, concurrent registration also is appropriate even where the parties cannot agree on which party is responsible for a particular reliability function.

NERC's position is consistent with the Commission's own pronouncements. In

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<sup>21</sup> As discussed below, Constellation has entered into a JRO with Luminant Generation Company LLC in the Texas RE Region to assume responsibility for certain of the GOP Reliability Standards, including (i) CIP-O-001-1, R. 1-4, (ii) COM-002-2, R. 1, (iii) EOP-004-1, R. 2, 3, 3.1, 3.2, 3.3 and 3.4, (iv) IRO-004-1, R. 4, (v) PRC-001-1, R. 2 and 2.1, (vi) TOP-001-1, R. 3, 6, 7, 7.1 and 7.3, (vii) TOP-002-2, R. 3, 13, 14, 14.1 and 15, (viii) TOP-003-0, R. 1, 1.1, 1.3, 2, and 3, (ix) TOP-006-1, R. 1.1 and (x) VAR-002-1, R. 1, 3 and 3.1.

<sup>22</sup> Constellation FERC appeal at 16 and 22.

<sup>23</sup> Constellation FERC appeal at 23-24.



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Order No. 693, the Commission accepted NERC's proposal to allow concurrent registration where parties could not agree on who was responsible for a given Reliability Standard or where parties agreed to split responsibility:

[E]ach "central" organization should be able to register as being responsible for compliance for itself and collectively on behalf of its members. Each member within a central organization may separately register to be accountable for a particular reliability function defined by the standards. *Under NERC's proposal, if the central organization and a member organization cannot agree that one organization or the other is responsible, or if the parties agree that the responsibilities for a particular reliability function should be split, then NERC would register both entities concurrently. NERC and the Regional Entities will then have the authority to find either organization or both accountable for a violation of a Reliability Standard, based on the facts of the case and the circumstances surrounding the violation.*<sup>24</sup>

There is no requirement that circumstances be extreme or extraordinary.

Even applying the standard above as articulated by Constellation, concurrent registration is appropriate here. Constellation simply errs in applying the standard to its own case. As to the first prong, Constellation agrees that the parties "have very clearly separated *responsibility*" for their activities with respect to the PRL Facility in the Tolling Agreement and the Market Participant. As the NERC BOTCC Decision found, PRL performs the physical operations and Constellation performs communications operations. Both activities are contemplated under the NERC GOP Reliability Standards, also a fact that Constellation does not dispute. Constellation even concedes that PRL is relying on Constellation for purposes of complying with the applicable GOP communications Reliability Standards.

As to the second prong, Constellation concedes that the parties have been unable to reach a voluntary agreement on joint responsibility. Because of the symbiotic roles in

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<sup>24</sup> Order No. 693 at P 103 (emphasis added) (describing NERC's procedures) and P 107 (finding these procedures to be "reasonable").

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compliance with applicable GOP Reliability Standards, which Constellation repeatedly heralds, the failure of PRL and Constellation to squarely address the NERC Reliability Standards, particularly given each pointing to the other as the entity required to comply, requires concurrent registration. Otherwise, there would be a clearly identifiable and significant gap in responsibilities under the Reliability Standards if both are not registered.

Yet, Constellation categorically refuses to accept that the communications activities it performs fall within the scope of the NERC Reliability Standards. To reiterate the basics of registration, NERC has the obligation and responsibility to register *actual* operators of bulk power system assets. GOPs perform both physical operations and communications operations. Here, Constellation performs the communications operations on behalf of the PRL Facility – a fact that it cannot and does not dispute.<sup>25</sup> While Constellation claims that PRL agreed in the Tolling Agreement to be solely responsible for NERC Reliability Standards, there is no reference to the NERC Reliability Standards.

The NERC BOTCC Decision squarely addressed this issue:

Curiously, both PRL and [Constellation] claim that the Tolling Agreement — to which each points in support of arguments that the other assumed the responsibilities for the GOP Reliability Standards — was developed and executed prior to the implementation of NERC’s mandatory and enforceable Reliability Standards and each argues that it should not be held accountable for the costs of compliance (or non-compliance) with the GOP Reliability Standards. The NERC Board of Trustees Compliance Committee notes that, in fact, the Tolling Agreement was executed on January 11, 2007, well after the enactment of the Energy Policy Act of 2005, which set in motion the current state in the electric industry. Subsequently, on July 20, 2006, but prior to the execution of the Tolling Agreement, the Commission issued its ERO Certification Order, in which it approved NERC as the ERO and approved NERC’s proposed Reliability

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<sup>25</sup> See, e.g., Constellation FERC appeal at 10, 12-13, 34 and 38.

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Standard Development Process and Enforcement program, among other things. Also prior to execution of the Tolling Agreement, on October 20, 2006, the Commission issued a Notice of Proposed Rulemaking on Mandatory Reliability Standards for the Bulk Power System, a number of which were approved and are in effect now.

Therefore, the NERC Board of Trustees Compliance Committee does not find persuasive the arguments, implicit or explicit, advanced by PRL and [Constellation] that it could not be foreseen that the Tolling Agreement should address each entity's compliance responsibilities with respect to NERC's imminent mandatory and enforceable Reliability Standards. To the contrary, the NERC Board of Trustees Compliance Committee finds the opposite is true and that, in fact, the Tolling Agreement does address the parties' respective obligations.<sup>26</sup>

If Constellation wanted to ensure that it would not be subject to NERC Reliability Standards by virtue of the communications interface activities with the ERCOT ISO, it should have made that clear in the agreement. In the course of the appeal, Constellation had a further opportunity to enter into a JRO with PRL. However, despite a remand of the appeal by NERC BOTCC and a subsequent extension of time to allow negotiations to continue, the parties purportedly reached an irreconcilable impasse. NERC does not believe a further remand by the Commission would reach a different result. Rather, NERC urges the Commission to uphold the concurrent registration of the parties. The Commission has instructed NERC to evaluate agreements between parties to determine the nature, scope and responsibility for activities performed that fall within the NERC Reliability Standards. The Commission has done so even in the context of agreements reached thirty years ago, well before the Energy Policy Act of 2005 and implementing rules, regulations and orders, in which there would be no explicit reference to the NERC Reliability Standards. Rather, the importance of evaluating these agreements is to determine what roles the parties have assumed and how they have allocated responsibility

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<sup>26</sup> NERC BOTCC Decision at 15.

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for the roles they do perform. Thus, it is entirely appropriate to consider what activities Constellation has agreed to perform and how those activities relate to applicable NERC Reliability Standards.

With respect to Constellation's contention that concurrent registration will provide incentives to Responsible Entities to claim that third-party service providers are responsible for applicable Reliability Standards,<sup>27</sup> the existing Commission-approved *Registry Criteria* already allows parties to identify those entities that are actually performing activities subject to the Reliability Standards. Indeed, the *Registry Criteria* is designed to identify actual owners, operators and users of the bulk power system that must comply with applicable Reliability Standards. Thus, concurrent registration provides an appropriate signal and incentives to parties to work out these issues in the first instance. If they do not, NERC and the Regional Entities can employ concurrent registration where necessary and appropriate.

While Constellation claims that concurrent registration will lead to a lack of clarity as to the Requirements, or even the discrete tasks or sub-requirements, for which each entity is responsible,<sup>28</sup> NERC disagrees and this is certainly not the case here where the Tolling Agreement and Market Participant Agreement clearly identify the activities to be performed by PRL and Constellation. To reiterate again, the possibility of concurrent registration will provide appropriate signals to parties to ensure that their existing and future agreements are sufficiently clear on the division of compliance responsibility. However, where they do not, NERC and the Regional Entities have the authority to find

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<sup>27</sup> Constellation FERC appeal at 23.

<sup>28</sup> Constellation FERC appeal at 23.

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either party or both accountable for a violation of a Reliability Standard based on the facts and circumstances surrounding a violation.

**3. Standard of Review**

Constellation urges the Commission to apply the “arbitrary and capricious” standard stemming from the Administrative Procedures Act (“APA”) in evaluating its registration appeal. However, Constellation misapprehends the applicable standard of review. The APA’s arbitrary and capricious standard applies to judicial review of agency decisions and not registration appeal decisions issued by the NERC BOTCC. The NERC BOTCC is not a federal agency and its decisions are subject to Commission oversight and the standard of review as articulated by the Commission.

In evaluating registration appeals, the Commission has properly recognized NERC’s plenary authority to register entities in accordance with the Commission-approved *Registry Criteria* and NERC Rules of Procedure. Out of over 1,800 registrations currently on the Compliance Registry, only 11 registration appeals, including Constellation’s, have been filed with the Commission. In all 10 of those prior appeals, the Commission has articulated the standard of review as whether NERC, in exercising its plenary authority, has provided adequate support for its registry determinations based on the applicable *Registry Criteria* and factual circumstances presented by a given case.<sup>29</sup> This is the appropriate standard of review and should be applied here.

As discussed above, in upholding Constellation’s concurrent registration as a GOP, NERC engaged in a reasoned analysis of the arguments and evidence before it and adequately supported its findings, consistent with the Energy Policy Act of 2005,

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<sup>29</sup> See, e.g., *New Harquahala Generating Co., LLC*, 123 ¶ 61,173 at PP 1 and 44 (2008).

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NERC's *Registry Criteria* and Rules of Procedure and the Commission's regulations, rules and orders. Constellation's claims to the contrary have no merit.

**4. There is No Support for Constellation's Claims that There is an Inconsistency in GOP Registrations in Other Regions**

The NERC BOTCC considered Constellation's arguments of an inconsistency in registration of GOPs among the Regions and the evidence before it and found these claims to be unsubstantiated and unfounded.<sup>30</sup> First, the NERC BOTCC found that Constellation failed to demonstrate that other Regions have a regulatory framework similar to ERCOT in which a QSE must act on behalf of a Resource.<sup>31</sup> Second, NERC BOTCC noted that Constellation itself admitted to entering into different contractual arrangements with other parties as to who would be the GOP, that would support differences in registration.<sup>32</sup>

In its appeal before FERC, Constellation reasserts its claims that there is an inconsistency in GOP registrations among the Regions and its appeal could arguably be read to suggest an inconsistency in the Texas RE Region. Constellation argues that the NERC BOTCC Decision erred in determining that Constellation had the burden of substantiating its claims of inconsistency in the other Regions.<sup>33</sup> Constellation contends that NERC has the burden to ensure consistency and has failed to demonstrate any distinguishing feature of a communications interface in ERCOT ISO compared to a communications interface in any other Independent System Operator ("ISO").

Constellation resurrects its arguments that it has entered into similar Tolling Agreements with other GOs and communicates information to ISOs and Regional

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<sup>30</sup> BOTCC Decision at 18.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Constellation FERC appeal at 15.

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Transmission Organizations (“RTOs”) on behalf of those generator owners in at least two other Regions (Reliability *First* Corporation and the Northeast Power Coordinating Council) that have not registered Constellation as a GOP. Yet, once again, Constellation does not identify the specific GOs on whose behalf it is acting nor has it provided the agreements to permit NERC or FERC to evaluate the merits of the claims. Constellation has not presented evidence that those other Regions have considered and declined to register Constellation or similarly situated entities. Constellation also does not address whether the other contractual arrangements to which it is a party accounts for any such “differences.”

NERC is committed to ensuring consistency in the Regions and has plenary authority to register Constellation, in those and any other Regions, as a GOP if the facts and circumstances so warrant. Simply because Constellation may not be registered in another Region does not alone support absolving Constellation from registration in the Texas RE Region. In any event, the Commission can rule on the merits of the instant appeal independent of these other issues.

Because Constellation asserts there is an inconsistency in registrations, it is appropriate for Constellation to bear the burden to support such claims. To date, NERC does not believe that Constellation has demonstrated that there is an inconsistency in registrations among the Regions. Constellation’s own arguments on inconsistency are, well, inconsistent.

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While Constellation asserts that none of the other Regions have registered it as a GOP, Constellation concedes that even Texas RE has not registered all QSEs as GOPs.<sup>34</sup> Indeed, such determinations are made on a case by case basis.

With respect to Constellation's argument that there is an improper blanket registration of all Level 4 QSEs as GOPs,<sup>35</sup> it is NERC's understanding that this is not the case. In some cases, the Level 4 QSEs are concurrently or solely registered as GOPs by agreement. By way of example, Constellation itself has entered into a JRO with Luminant Generation Company LLC in the Texas RE Region to assume responsibility for certain of the GOP Reliability Standards, including (i) CIP-001-1, R. 1-4, (ii) COM-002-2, R. 1, (iii) EOP-004-1, R. 2, 3, 3.1, 3.2, 3.3 and 3.4, (iv) IRO-004-1, R. 4, (v) PRC-001-1, R. 2 and 2.1, (vi) TOP-001-1, R. 3, 6, 7, 7.1 and 7.3, (vii) TOP-002-2, R. 3, 13, 14, 14.1 and 15, (viii) TOP-003-0, R. 1, 1.1, 1.3, 2, and 3, (ix) TOP-006-1, R. 1.1 and (x) VAR-002-1, R. 1, 3 and 3.1.<sup>36</sup> Yet, there is no mention of this JRO in Constellation's appeal. Constellation's claim that it has no ability or authority to comply with or ensure compliance with any entire Requirement is disingenuous. The fact that Constellation has the ability or authority to comply with any element of a Requirement in a Reliability Standard is sufficient to justify its registration. Constellation's argument also is

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<sup>34</sup> Constellation FERC appeal at 56-57.

<sup>35</sup> Constellation FERC appeal at 29.

<sup>36</sup> See NERC Compliance link at [www.nerc.com](http://www.nerc.com). Rule 505.5 of the NERC Rules of Procedure provides "NERC shall maintain, and shall post on its web site, a Joint Registration Organization registry listing all joint registrations that have been accepted by NERC or by a regional entity and the reliability standards and requirements thereof for which each JRO and each of its members or related entities is responsible under the joint registration. The postings on NERC's web site shall clearly identify the compliance responsibilities of the JRO and of each of its member(s) or related entit(ies). Such postings are intended to enable reliability coordinators and other system operators to be fully aware of responsibilities and chains of command in order to respond quickly and decisively to system operation events."



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undermined by the fact that it has entered into a JRO with a third party and has assumed responsibility for certain Reliability Standard Requirements.<sup>37</sup>

In other cases, a GO has agreed to be solely registered as the GOP. As Constellation notes, it serves as a QSE for the generation facility owned and operated by Wolf Hollow in ERCOT but Wolf Hollow is registered as the sole GOP.<sup>38</sup> This does not evidence an inconsistency. Importantly, Constellation fails to explain that Wolf Hollow expressly agreed to be solely registered as the GOP. As a result, there is no gap in such a case warranting registration of Constellation as a GOP.

Between and among the Regions, entities such as Constellation enter into different contractual arrangements with other parties governing their registration and compliance responsibilities, as Constellation itself concedes. The record evidence here does not suggest there is an inconsistency within Texas RE or among the Regions.

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<sup>37</sup> Constellation expends considerable effort in its appeal arguing that if two entities were required to be responsible for the same Reliability Standard, there would be confusion as to who is performing the sub-tasks under the Reliability Standard. In particular, Constellation cites to CIP-001-1 by way of example. Constellation FERC appeal at 40, 45. And yet, in its JRO with Luminant, both Constellation and Luminant are responsible for certain of the same Reliability Standards, most notably CIP-001-1, as well as others including EOP-004-1.

<sup>38</sup> Constellation FERC appeal at 57 and n.107.

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**VI. CONCLUSION**

Wherefore, in view of the foregoing, NERC respectfully requests that it be permitted to intervene with all the rights that attend to such status and requests that the Commission issue an order consistent with the comments set forth herein.

Respectfully submitted,

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**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 11th day of August, 2008.

/s/ Rebecca J. Michael  
Rebecca J. Michael

*Attorney for North American Electric  
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