

---

---

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

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

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

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213, the North American Electric Reliability Corporation (“NERC”) hereby moves for leave to answer and answers the comments submitted by Shell Energy North America (US), L.P. (“SENA”) in the above-referenced proceeding.

**I. PROCEDURAL HISTORY**

On July 11, 2008, Constellation Energy Commodities Group, Inc. (“Constellation”) filed an appeal of the May 22, 2008 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”).

On July 15, 2008, the Commission set the due date of August 11, 2008 for any person desiring to intervene or to protest Constellation’s appeal.<sup>1</sup> On August 11, 2008, NERC submitted a timely motion to intervene and comments in the proceeding. On or about August 11, 2008, two other entities also filed interventions, protests and/or

---

<sup>1</sup> *Constellation Energy Commodities Group, Inc.*, Docket No. RC08-7-000, “Notice of Filing,” (2008).

comments regarding Constellation's July 11, 2008 appeal.<sup>2</sup> On August 26, 2008, Constellation submitted an Answer to the timely comments that were filed by NERC, Texas RE and ("Power Resources, Ltd.") PRL.<sup>3</sup> On September 22, 2008, SENA submitted a motion to intervene out of time and to submit comments.<sup>4</sup> By this filing NERC requests leave to file this Answer to issues raised in SENA's untimely intervention and comments.

## **II. NOTICES AND COMMUNICATIONS**

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

Rick Sergel  
President and Chief Executive Officer  
David N. Cook\*  
Vice President and General Counsel  
North American Electric Reliability Corporation  
116-390 Village Boulevard  
Princeton, NJ 08540-5721  
(609) 452-8060  
(609) 452-9550 – facsimile  
david.cook@nerc.net

Rebecca J. Michael\*  
Assistant General Counsel  
North American Electric Reliability  
Corporation  
1120 G Street, N.W.  
Suite 990  
Washington, D.C. 20005-3801  
(202) 393-3998  
(202) 393-3995 – facsimile  
rebecca.michael@nerc.net

\*Persons to be included on the Commission's official service list.

## **III. MOTION FOR LEAVE TO FILE ANSWER**

The Commission's rules permit the filing of answers to motions in which parties seek substantive relief. The Commission's rules generally do not permit the filing of answers to protests, unless otherwise permitted by the Commission.<sup>5</sup> However, the Commission has granted motions for leave to file such answers if they will clarify issues

---

<sup>2</sup> Motion to Intervene and Comments of Power Resources, Ltd. (PRL); and Motion to Intervene and Comments of Texas Regional Entity, an Independent Division of Electric Reliability Council of Texas, Inc. (Texas RE).

<sup>3</sup> Motion to Leave to Answer and Answer of Constellation Energy Commodities Group, Inc.

<sup>4</sup> Motion to Intervene and Comments of Shell Energy North America (US), L.P. (SENA).

<sup>5</sup> See 18 C.F.R. §385.213(a)(2).

in dispute, ensure a complete and accurate record or otherwise provide information to assist the Commission in its decision-making process.<sup>6</sup> NERC's Answer is limited and will clarify certain concerns raised in SENA's untimely comments. In addition, this Answer will provide information that will assist the Commission in its decision-making process. Accordingly NERC requests permission to submit this Answer.

#### **IV. ANSWER**

In its comments, SENA misapprehends prior Commission Orders which give NERC the right to review contracts. According to SENA:

Putting aside whether section 215 of the Federal Power Act extends to anyone with the "ability" to comply with "any element" of a reliability standard,[] SENA asks the Commission to reject NERC's apparent arguments that GOP registration responsibility can be teased simultaneously from a tolling agreement, status as a QSE in ERCOT, and/or possession of the ability to comply with the elements of a reliability standard. These NERC contentions will surely lead to redundancies in GOP registration. They could also create uncertainties among the redundant GOPs as to which is responsible for specific aspects of a Reliability Standard, risking gaps in maintaining that standard. **And reading GOP registration responsibility into an agreement such as a tolling agreement or a QSE agreement risks changing unilaterally the terms of those contracts.[]**<sup>7</sup>

\*\*\*

**In sum, SENA recommends that the Commission resolve the instant dispute by adopting a sensible and unambiguous approach for registering GOPs that avoids interfering with private contracts, consistent with Order No. 693 and 693-A.**<sup>8</sup>

---

<sup>6</sup> *San Diego Gas & Electric v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,219, at P14, n. 7 (2004) (answer was accepted as it "provided information that assisted [FERC in its] decision-making process"); *see also 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, Order Certifying NERC as the Electric Reliability Organization and Ordering Compliance Filing*, 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, Order Conditionally Accepting 2007 Business Plan and Budget of the North American Electric Reliability Corporation, Approving Assessments to Fund Budgets and Ordering Compliance Filings*, 117 FERC ¶61,091, at P 18 (2006) (same); *North American Electric Reliability Corporation*, 119 FERC ¶ 61,248 (2007) at P 6 (same).

<sup>7</sup> *See* SENA Comments at 4-5 (emphasis added) (footnotes omitted).

<sup>8</sup> *Id.* at 5 (emphasis added).

Neither the NERC BOTCC decision or NERC's intervention and comments, in this proceeding, require a change to any existing contracts. NERC agrees that Order No. 693 is clear that the Commission did not intend to change or affect existing contracts that set forth the responsibilities of various entities. Indeed, the Commission stated:

107. The Commission directs the ERO to file procedures which permit (but do not require) an organization, such as a joint action agency, G&T cooperative or similar organization to accept compliance responsibility on behalf of its members. The Commission believes that NERC's proposed procedures described above are reasonable, and directs the ERO to submit a filing within 60 days.[] In allowing a joint action agency, G&T cooperative or similar organization to accept compliance responsibility on behalf of its members, **our intent is not to change existing contracts, agreements or other understandings as to who is responsible for a particular function under a Reliability Standard.** Further, we clarify that there should not be overlaps in responsibility nor should there be any gaps.

\*\*\*

141. In response to the many concerns of commenters, **the Commission clarifies that it did not intend to change existing contracts, impose new organizational structures or otherwise affect existing agreements that set forth the responsibilities of various entities.** Rather, its intent was to allow enough granularity in the definitions so that the appropriate user, owner or operator of the Bulk-Power System would be identified for each Reliability Standard. We agree also with MISO's statement that nothing in the Functional Model requires one entity to be responsible for all of the tasks within a function, regardless of who actually performs the task.<sup>9</sup>

Importantly, the Commission has had occasion to consider the importance of reviewing pre-existing agreements and contracts to determine an entity's compliance obligations with respect to a given function and applicable Reliability Standards. In particular, the Commission has issued two prior Compliance Registry Appeal Orders addressing this specific issue. On February 21, 2008, the Commission issued an Order remanding the proceeding to NERC regarding the Southeastern Power Administration

---

<sup>9</sup> *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 72 FR 16,416 (Apr. 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2007) at PP 107, 141 (footnote omitted).

(“SEPA”) appeal.<sup>10, 11</sup> The Commission expressed concern that neither NERC nor SERC Reliability Corporation (“SERC”) provided an analysis of the terms of the Memoranda of Understanding:

**22. The Commission is concerned that the analysis of NERC and SERC focuses on SEPA’s historical activities[] without considering the terms of the Memoranda of Understanding and whether the parties to the contract intended to convey responsibility to SEPA.** NERC cursorily states that “[i]n light of the fact that memorandums of understanding currently exist *that obligate SEPA to provide the functions at issue here*, SEPA may not merely renounce its obligations.”[] **NERC, however, does not provide an analysis of the Memoranda of Understanding or point to specific language that obligates SEPA.** SEPA, on the other hand, acknowledges that it performs the tasks but contends that the Memoranda of Understanding do not transfer responsibility to SEPA.[] The Memoranda of Understanding are not part of the record in this proceeding.<sup>12</sup>

23. Intergovernmental Memoranda of Understanding vary in nature and purpose; it is possible that such documents do not contractually bind the signatory agencies or convey rights and responsibilities as would a bilateral contract between two private parties. Thus, the Commission is concerned that, if the Corps is responsible by statute as the owner and operator of its facilities and SEPA has not accepted contractual responsibility for the transmission operator activities that it performs, the Corps may be the appropriate entity to register as the transmission operator. Alternatively, the specific circumstances may justify a joint registration of both the Corps and SEPA.[] However, the record before the Commission is not sufficient to make such a determination. Accordingly, we direct NERC to address these concerns in resubmitting its registration determination.<sup>13</sup>

On July 21, 2008, the Commission issued an Order on the merits regarding the United States Department of Energy, Portsmouth/Paducah Project Office (“DOE/PPPO”) appeal.<sup>14</sup> The Commission acknowledged that NERC’s decision was reasonable in

---

<sup>10</sup> *Southeastern Power Administration*, “Order Remanding Proceeding to Electric Reliability Organization,” 122 FERC ¶ 61,140 (2008).

<sup>11</sup> The Commission has not yet issued a decision on merits regarding SEPA’s Compliance Registry Appeal.

<sup>12</sup> *Id.* at P 22 (footnotes omitted).

<sup>13</sup> *Id.* at P 23 (footnote omitted).

<sup>14</sup> *U.S. Department of Energy, Portsmouth/Paducah Project Office*, “Order on Appeal of Electric Reliability Organization Compliance Registry Determination,” 124 FERC ¶ 61,072 (2008).

reviewing the language in the lease and operations contract to determine the agreement did not clearly state that DOE/PPPO had transferred to the United States Enrichment Corporation responsibility for compliance with future regulatory obligations such as mandatory Reliability Standards.

**43. The Commission rejects DOE Portsmouth’s reliance on language in its lease and operations contract to support its assertion that it has transferred responsibility for compliance with Reliability Standards to USEC.** As noted above, DOE Portsmouth provided an excerpt of its lease with USEC that requires USEC to maintain the leased premises in good and serviceable condition and perform repairs necessary to maintain the premises “in such condition to meet the requirements of applicable Laws and Regulations.”[] The remainder of the lease has not been filed with the Commission in this proceeding. Based on the language provided by DOE Portsmouth, it does not appear that USEC has agreed to undertake responsibility for complying with obligations such as Reliability Standards. The lease excerpt pertains to the maintenance and repair of the leased premises. The Reliability Standards for which DOE Portsmouth has been registered do not address, except perhaps in an indirect way, whether the facilities are in “serviceable condition.” They likewise are not relevant to USEC’s duty to make repairs. Rather, Reliability Standards impose different and more extensive obligations on the transmission owner and operator, for example, related to critical infrastructure protection and communications. We therefore cannot conclude that the excerpt of the lease cited by DOE Portsmouth supports its contention that the obligation to comply with Reliability Standards has been assigned to USEC. **The Commission finds that NERC’s decision is reasonable in determining that the language upon which DOE Portsmouth relies is ambiguous and does not clearly contemplate that DOE Portsmouth has transferred to USEC responsibility for compliance with future regulatory obligations such as mandatory Reliability Standards.**<sup>15</sup>

Accordingly, SENA’s argument that it is inappropriate and unnecessary to review pre-existing agreements is wrong.

---

<sup>15</sup> *Id.* at P 43 (emphasis added) (footnote omitted).

V. **CONCLUSION**

The North American Electric Reliability Corporation respectfully requests that the Commission accept this Answer and issue an order consistent with the comments set forth herein.

Rick Sergel  
President and Chief Executive Officer  
David N. Cook  
Vice President and General Counsel  
North American Electric Reliability Corporation  
116-390 Village Boulevard  
Princeton, NJ 08540-5721  
(609) 452-8060  
(609) 452-9550 – facsimile  
david.cook@nerc.net

Respectfully submitted,

/s/ Rebecca J. Michael  
Rebecca J. Michael  
Assistant General Counsel  
North American Electric Reliability  
Corporation  
1120 G Street, N.W.  
Suite 990  
Washington, D.C. 20005-3801  
(202) 393-3998  
(202) 393-3955 – facsimile  
rebecca.michael@nerc.net

**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 8th day of October, 2008.

/s/ Rebecca J. Michael  
Rebecca J. Michael

*Attorney for North American Electric  
Reliability Corporation*