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

**Department of Energy, Portsmouth/Paducah     )**     **Docket No. RC08-5-000**  
**Project Office   )**

**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. BACKGROUND**

On May 13, 2008, the U.S. Department of Energy Portsmouth/Paducah Project Office (DOE/PPPO) filed an appeal of the April 22, 2008 Decision rendered by NERC's Board of Trustees Compliance Committee (BOTCC) to include DOE/PPPO on the NERC Compliance Registry within the Reliability *First* Corporation (RFC) for the functions of Transmission Owner (TO), Transmission Operator (TOP), Load-Serving Entity (LSE) and Distribution Provider (DP).<sup>1</sup>

DOE is the original owner and operator of equipment used to operate the uranium enrichment site located at Portsmouth, Ohio. This site includes plant facilities used for uranium enrichment (including a new gas centrifuge uranium enrichment facility), along

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<sup>1</sup> DOE/PPPO FERC Appeal, Docket No. RC08-5-000 (May 13, 2008) (DOE/PPPO FERC Appeal).

with electrical equipment that is used to deliver or receive power from the bulk power system (BPS) to these plants. By an agreement executed in 1993, DOE has an agreement with the United States Enrichment Corporation (USEC) to lease the switchyards, ancillary equipment and portions of the Gaseous Diffusion Plant for USEC's commercial uranium enrichment enterprise.<sup>2</sup> DOE/PPPO describes USEC as an “independent, for-profit less[ee]” of the switchyard facilities.<sup>3</sup>

The DOE Portsmouth site has two 345 kV Substations on its reservation, X-530 and X-533, with approximately 2,200 MW of capacity. These two switchyards are interconnected with the transmission system of the Ohio Valley Electric Corporation (OVEC). The DOE – Portsmouth switchyards operate at 345 kV with twenty-eight (28) 345 kV - 13.8 kV transformers and are connected through ten (10) 345 kV incoming lines to the BPS.<sup>4</sup> According to DOE’s May 13, 2008 filing at FERC, it has determined, since the filing of its appeal to NERC, to shut down the X-533 switchyard and reduce five (5) of the 345 kV lines that connect to the grid and to relocate the high voltage transmission lines around the switchyard.<sup>5</sup>

Currently, each of the Substations is fed by five 345 kV lines. DOE owns one 345 kV line that feeds into X-530 and owns another 345 kV line that feeds into X-533. The switchyards presently have approximately 450 MW of flow through. The OVEC-owned Don Marquis Substation and the OVEC-owned Sargents Substation also are included within the reservation.

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<sup>2</sup> Board of Trustees Compliance Committee Decision on DOE/PPPO Appeal of Compliance Registry Determination at 1 (Issued April 22, 2008) (NERC BOTCC Decision) at 1.

<sup>3</sup> DOE/PPPO FERC Appeal at 5.

<sup>4</sup> NERC BOTCC Decision at 1.

<sup>5</sup> DOE/PPPO FERC Appeal at 3-5.

While the X-530 and X-533 substations were originally designed to provide power solely to the DOE facility, the site load has reduced. As a result, OVEC has utilized these facilities as system tie points to transmit power across the system. Net power consumption from loads attached to the X-530 and X-533 is metered by OVEC. 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.<sup>6</sup>

According to DOE/PPPO:

The future configuration of the Portsmouth site is in a state of transition, as a plan to initiate a decade's long decontamination and decommissioning (D&D) project is beginning. A privately funded next generation uranium enrichment project (the American Centrifuge Plant) is being undertaken by the USEC in leased former Gas Centrifuge facilities located at the Portsmouth site. USEC will be obtaining power to serve the operational power needs of the American Centrifuge Plant. Additionally, a new facility is being constructed at the site by the Uranium Disposition Services Corporation (UDS) to accomplish conversion of the legacy depleted UF<sub>6</sub> co-product to UO<sub>x</sub>.<sup>7</sup>

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<sup>6</sup> NERC BOTCC Decision at 1.

<sup>7</sup> DOE/PPPO FERC Appeal at 3.

## II. NOTICES AND COMMUNICATIONS

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## III. 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>8</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-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.

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<sup>8</sup>*Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 61,062 (2006).

On April 19, 2007, the Commission approved delegation agreements between NERC and eight Regional Entities, including a delegation agreement between NERC and RFC.<sup>9</sup> Pursuant to a delegation agreement, NERC delegated to RFC the authority to enforce mandatory Reliability Standards within the RFC 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>10</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 RFC, 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.

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

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<sup>9</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>10</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).

party can adequately represent NERC's interest. Therefore, it is in the public interest to permit this intervention.

#### **IV. COMMENTS**

As set forth in the Decision, the NERC BOTCC reviewed and considered the evidence and arguments presented by DOE/PPPO and RFC, determined that DOE/PPPO is properly registered as a TO, TOP, LSE and DP and explained the bases for its findings and conclusions. In that same Decision, the NERC BOTCC reversed RFC's determination to register DOE/PPPO as a Purchasing-Selling Entity (PSE).

The NERC BOTCC Decision is based on a straightforward application of the NERC *Registry Criteria* and is fully supported by the record presented to the NERC BOTCC and the record now before the Commission. The Decision is consistent with Section 215 of the FPA and Commission precedent thereunder. DOE/PPPO's claims to the contrary are without merit, and the Commission should affirm the NERC BOTCC Decision.

##### **A. The Existing Registry Criteria Was Properly Applied and DOE/PPPO Meets the Criteria for Registration as a TO, TOP, LSE and DP.**

With respect to the application of the NERC *Registry Criteria*, DOE/PPPO asserts three claims in support of its position that it should not be registered as a TO, TOP, LSE or DP.

- First, DOE/PPPO claims that it does not meet the existing *Registry Criteria* to be registered as a TO, TOP, LSE and DP.
- As a corollary argument, in its FERC appeal, DOE/PPPO also announces that a recent decision has been made to shut down the X-533 switchyard which will result in a reduction of the number of lines from ten to five that connect the site to the BPS, which it states also was not considered in the NERC BOTCC Decision.<sup>11</sup>

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<sup>11</sup> DOE/PPPO FERC Appeal at 4-5.

- Second, DOE/PPPO claims that NERC BOTCC and RFC applied “new criteria” in evaluating its claims that DOE/PPPO had transferred responsibility for certain functions to another entity.
- Third, DOE/PPPO claims that its arguments that show the Portsmouth site does not materially impact the BPS were not considered.

However, as shown below, the NERC BOTCC Decision properly applied the existing registration criteria in determining that DOE/PPPO meets the criteria for registration as a TO, TOP, LSE and DP. The scheduled shutdown of X-533 does not materially alter the determinations underlying the NERC BOTCC Decision.

The NERC BOTCC Decision also properly applied the existing and documented “exclusion” language in the criteria. Because DOE/PPPO apparently misread the transfer requirements in the exclusion language, it thereby incorrectly concluded new criteria were being imposed.

Finally, NERC BOTCC Decision acknowledged DOE/PPPO’s material impact arguments. The NERC *Registry Criteria* defines those users, owners and operators that are material to the reliability of the BPS and was properly applied here.

NERC responds to DOE/PPPO on each of these issues below.

**1. DOE/PPPO meets the existing *Registry Criteria* as a TO, TOP, LSE and DP.**

**TO and TOP Registration**

As stated in the NERC BOTCC Decision, Section II of the *Registry Criteria* (Rev. 4.0) defines a TO as “[t]he entity that owns and maintains transmission facilities.”

Section II of the *Registry Criteria* defines a TOP as “[t]he entity responsible for the reliability of its local transmission system and operates or directs the operations of the transmission facilities.” The TO/TOP criteria, in section III.d.1 of the *Registry Criteria*

that applies is: “An entity that owns/operates an integrated transmission element associated with the bulk power system 100 kV and above, or lower voltage as defined by the Regional Entity necessary to provide for the reliable operation of the interconnected transmission grid.”

An exclusion to the TO and TOP criteria provides that a transmission 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, as described in Sections 501 and 507 of the NERC *Rules of Procedure*.

Currently, DOE/PPPO’s transmission facilities consist of two 345 kV Substations (X-530 and X-533) and two 345 kV transmission lines, as well as other facilities. In its FERC appeal, DOE/PPPO acknowledges that its switchyards are connected to the regional power grid and allow power to be directed to load-serving step down transformers or to be redirected to the regional power grid.<sup>12</sup> The two switchyards are interconnected with OVEC’s transmission system.<sup>13</sup> According to DOE/PPPO:

The two switchyards comprise part of the path over which OVEC delivers power from its two coal-fired generating stations (Kryger and Clifty Creek Generating Stations) to its eleven owner companies, as well as the delivery of electric power to the Portsmouth site to meet its loads, which currently peak annually at about 45 MW.<sup>14</sup>

Even with DOE/PPPO’s newly announced scheduled shutdown of the X-533 switchyard and reduction of five (5) 345 kV transmission lines, there will still remain one X-530 345 kV Substation, five (5) 345 kV transmission lines (one of which is owned by

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<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



DOE) and the high voltage transmission lines from the X-533 Substation to be relocated around the switchyard. Therefore, even with the eventual shutdown of one of the two switchyards and the elimination of five of the ten 345 kV transmission lines, DOE/PPPO still will own integrated transmission elements associated with the BPS 100 kV and above that are necessary to provide for the reliable operation of the interconnected transmission grid, as set forth in the *Registry Criteria*.

Notably, there is no dispute that DOE/PPPO *owns* transmission facilities at the Portsmouth site. In its FERC appeal, DOE/PPPO acknowledges that it retains title to the switchyards.<sup>15</sup> Yet, DOE/PPPO claims that the lease agreement executed on July 1, 1993 by which USEC exercises maintenance, operation and control over the leased facilities is a “form of ownership.”<sup>16</sup> DOE/PPPO states that, while it owns the facilities, it does not “maintain” them nor is it responsible to operate or direct the operation of the switchyards. According to DOE/PPPO, to the extent it is required to comply with the reliability standards, it has transferred responsibility for TO and TOP compliance to USEC by written agreement; therefore, DOE/PPPO should not be registered as the TO or TOP.

As the *Registry Criteria* makes clear, in order for USEC to be registered as the TO and TOP, DOE/PPPO must demonstrate that 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, as described in Sections 501 and 507 of the NERC *Rules of Procedure*. Sections 501 and 507 require that the parties agree

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<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.*

in writing to be registered for the specific responsibilities to be transferred and that the parties must be registered for the appropriate functions.

In support of its claim that it has transferred the TO, TOP and DP obligations to USEC, DOE/PPPO relies on the provision in the lease agreement which states: “The Corporation will, at its expense, throughout the Lease Term, maintain the Leased Premises in good and serviceable condition. The Corporation shall repair any of the Leased Premises when in the Corporation’s business judgment it is necessary to do so in order to maintain them in such condition or to meet the requirements of applicable Laws and Regulations.”<sup>17</sup> The lease agreement further provides that “Laws and Regulations” means “all laws and regulations . . . and other requirements of Governmental Authority . . . which apply to the Department or the Corporation, as the case may be.”<sup>18</sup>

While in writing, the lease agreement does not, on its face, effectuate a written agreed upon transfer of responsibility for compliance with the mandatory and effective reliability standards, implicitly or explicitly, nor does it require registration of USEC on DOE/PPPO’s behalf under the appropriate functional entity designations. Rather, the cited provision in the lease agreement only pertains to repairing facilities to meet requirements of applicable laws and regulations. No other agreement is provided as evidence of the division of responsibilities for the substantive requirements of the reliability standards. Rather, the agreement upon which DOE/PPPO relies was executed years before the Energy Policy Act of 2005 and the new era of mandatory and enforceable reliability standards.<sup>19</sup> Importantly, USEC, as the counterparty to the lease

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<sup>17</sup> *Id.* at Enclosure 2B (emphasis added).

<sup>18</sup> *Id.* at 5-6.

<sup>19</sup> See DOE/PPPO FERC Appeal at Enclosure 2B. See also DOE/PPPO FERC Appeal at Exhibit Enclosure 2C and DOE/PPPO FERC Appeal at Attachment B Challenge to Functional Categories at 1.

agreement, maintains that it has not contractually assumed responsibility for compliance with the reliability standards as a TO or TOP. Moreover, USEC maintains that a new agreement would be required in order for such responsibilities to be transferred to it.<sup>20</sup>

Significantly, NERC lacks authority to require USEC to modify its existing agreement or to enter into a new agreement to accept such responsibilities. Because USEC has not agreed to accept responsibility and the lease agreement cannot be read to specifically assign responsibility to USEC for the reliability standards and requirements applicable to owning or operating a substation and transmission lines and scheduling energy, DOE/PPPO is properly registered as the TO and TOP.

### **LSE Registration**

Section II of the *Registry Criteria* defines an LSE as an entity that “[s]ecures energy and transmission service (and related interconnected operations services) to serve the electrical demand and energy requirements of its end-use customers.” Section III.a.1 states “Load-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system.” An exclusion to this LSE criteria provides that: “A load-serving entity 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... as described in Sections 501 and 507 of the NERC *Rules of Procedure*.”

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<sup>20</sup> BOTCC Decision at 9.

DOE/PPPO states that PPPO is the end-use customer and therefore not an LSE. DOE/PPPO claims that OVEC is the LSE, because OVEC provides services pursuant to the contract with DOE.<sup>21</sup>

RFC designated DOE as the LSE because DOE enters into bilateral contracts with OVEC for the procurement of power to serve load at the DOE site. In its FERC appeal, DOE/PPPO affirms that OVEC currently provides DOE with its power via month-to-month contracts under which OVEC purchases a block of power in the wholesale market sufficient to meet DOE's peak demand with required reserves.<sup>22</sup> As DOE states, "[t]he existing contract for site power is between DOE and OVEC with all site entities sharing the electric cost according to their load."<sup>23</sup> The NERC BOTCC Decision properly found, therefore, that DOE is the LSE and the function provided by OVEC is that of a PSE.

### **DP Registration**

Section II of the *Registry Criteria* defines a DP as an entity that "[p]rovides and operates the "wires" between the transmission system and the end-use customer. For those end-use customers who are served at transmission voltages, the Transmission Owner also serves as the DP. Thus, the DP is not defined by a specific voltage, but rather as performing the Distribution function at any voltage." With respect to the DP designation, Section III.b.1 applies to a Distribution provider system serving > 25 MW of peak load that is directly connected to the bulk power system. An exclusion to this DP criteria provides that: "A distribution provider will not be registered based on this criterion if responsibilities for compliance with approved NERC reliability standards or associated requirements including reporting have been transferred by written agreement

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<sup>21</sup> DOE/PPPO FERC Appeal at 7.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> DOE/PPPO FERC Appeal at Attachment E.

to another entity that has registered for the appropriate function for the transferred responsibilities ... as described in Sections 501 and 507 of the NERC *Rules of Procedure*.”

The DOE/PPPO facilities are used to serve both USEC and PPPO as end-use customers. As discussed above, the “DOE – Portsmouth switchyards operate at 345 kV with twenty eight (28) 345 kV – 13.8 kV transformers and are connected through ten (10) 345 kV incoming lines to the BPS ... The switchyards presently have approximately 450 MW of flow through.”<sup>24</sup> Because the lease agreement does not effectuate an agreed upon transfer of responsibilities from DOE/PPPO to USEC as required by the *Registry Criteria*, DOE is properly registered as the DP.

**2. NERC BOTCC did not apply “new” or “undocumented” criteria in evaluating DOE/PPPO claims that DOE/PPPO had transferred responsibility for certain functions to another entity.**

DOE/PPPO’s claims that the NERC BOTCC applied “new” or “undocumented” criteria in evaluating its claims that it had transferred responsibility to USEC have no merit.<sup>25</sup> According to DOE/PPPO, new, undocumented criteria results from the BOTCC Decision requirement that DOE/PPPO carries the burden to demonstrate that a third party has accepted performance of the TO/TOP standards.<sup>26</sup> DOE/PPPO asserts that the burden is on RFC and NERC to demonstrate that DOE/PPPO meets the TO/TOP criteria and that exclusions described in the criteria do not apply.<sup>27</sup> DOE/PPPO further argues that it was an error to require that the transfer can only be effective if the third party has

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<sup>24</sup> See RFC Assessment at 4.

<sup>25</sup> DOE/PPPO FERC Appeal at 6-7.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.*

subjective understanding that it has assumed TO/TOP standards.<sup>28</sup> DOE/PPPO claims that these additional criteria are not part of the published *Registry Criteria* and are not supported by the facts.<sup>29</sup> DOE/PPPO claims that the BOTCC Decision should have given effect to the plain meaning of the agreements between the parties, regardless of the date of the agreements or whether reliability standards are explicitly addressed in such agreements.<sup>30</sup>

DOE/PPPO misapprehends the plain terms of the *Registry Criteria* and the NERC Rules of Procedure. For ease of reference, the *Registry Criteria* provides:

III(d) Transmission Owner/Operator:

III.d.1 An entity that owns/operates an integrated transmission element associated with the bulk power system 100 kV and above, or lower voltage as defined by the Regional Entity necessary to provide for the reliable operation of the interconnected transmission grid; or

III.d.2 An entity that owns/operates a transmission element below 100 kV associated with a facility that is included on a critical facilities list that is defined by the Regional Entity.

***[Exclusion: A transmission 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.]***

The NERC *Rules of Procedure* sections 501.1.2.7,<sup>31</sup> 507.2<sup>32</sup> and 507.6<sup>33</sup> state that, with respect to a Joint Registration Organization, the *members must agree, in writing,*

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<sup>28</sup> *Id.* at 6-7.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.*

<sup>31</sup> Rules of Procedure 501.1.2.7 states: “(a) A generation or transmission cooperative, a joint-action agency or another organization (a Joint Registration Organization or JRO) may be registered, in lieu of each of the JRO’s members or related entities being registering individually, by the JRO accepting the reliability functions identified in Section 1.1 above, or (b) a JRO and its members or related entities may enter into a

*and accept the reliability functions for which they will be responsible.* The agreement must clearly specify the parties' responsibilities, and the JRO must provide annually 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.

Thus, DOE/PPPO would not be registered based on the *Registry 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, as described in Sections 501 and 507 of the NERC *Rules of Procedure*.

As stated above, both RFC and the NERC BOTCC Decision found that DOE/PPPO meets the criteria of a TO and TOP. If DOE/PPPO wishes to transfer its obligations to a third party, and no other party has notified NERC or the Regional Entities that it has assumed obligations on DOE/PPPO's behalf, DOE/PPPO must necessarily

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written agreement as to which of them will be responsible for one or more reliability standards applicable to a particular function and/or for one or more requirements within particular reliability standards applicable to a particular function and/or for one or more requirements within particular reliability standards, in either case in accordance with the provisions specified in Section 507 (each of (a) and (b), a "joint registration")."

<sup>32</sup> Rules of Procedure 507.2 states: "**Joint registration pursuant to written agreement.** Where a JRO and any of its members or related entities agree, in writing, upon a division of compliance responsibility among them for one or more reliability standard(s) applicable to a particular function, and/or for one or more requirements within particular reliability standard(s), both the JRO and such member(s) or related entit(ies) shall register as an organization responsible for that function. The JRO and its member(s) or related entit(ies) must have a written agreement that clearly specifies their respective responsibilities, which shall be submitted as part of the joint registration. Neither NERC nor the regional entity shall be parties to any such agreement between a JRO and its member or related entit(ies), nor shall NERC or the regional entity have responsibility for reviewing or approving any such agreement, other than to verify that the agreement provides for an allocation or assignment of responsibilities consistent with the joint registration."

<sup>33</sup> Rules of Procedure 507.6 states: "Annually following submission of a joint registration, the JRO shall provide the regional entity with a list, in a form specified by the regional entity, that identifies the members or related entities and the functions for which the JRO has registered on behalf of such members or related entities and for which the JRO assumes compliance responsibility. Additionally, a JRO shall provide a revised list of compliance responsibilities to the regional entity each time the JRO accepts additional compliance responsibilities for a member or related entity or for a new member or related entity and each time that any compliance reliability reverts from the JRO to a member or related entity. The regional entity shall promptly notify NERC of each such revision."

bear the burden of demonstrating such a transfer. The burden does not fall upon RFC and NERC. DOE/PPPO must have understood this requirement because it provided the lease agreement provision. As to the requirement that the third party must understand and agree to the responsibilities it is undertaking, this is clearly set forth in the *Registry Criteria* and the *NERC Rules of Procedure*.

Contrary to DOE/PPPO's claims, RFC and the NERC BOTCC Decision explained why the lease agreement does not satisfactorily meet the requirements in the *Registry Criteria* and the *NERC Rules of Procedure* and no new or undocumented criteria were applied. Simply put, USEC and DOE/PPPO have not agreed in writing to a clear delineation of responsibilities that meets the letter and spirit of the *Registry Criteria* and the *NERC Rules of Procedure*.

The NERC BOTCC Decision properly applied the existing criteria in determining that DOE/PPPO must be registered. The registration of DOE/PPPO ensures that there is no gap in reliability. DOE/PPPO is not precluded from seeking to enter into an agreement with USEC as to registration and the division of responsibilities. However, neither NERC nor the NERC Board of Trustees Compliance Committee has the authority to direct an entity to enter into an agreement to assume obligations on behalf of another, nor does the *NERC Registry Criteria* allow NERC or the NERC Board of Trustees Compliance Committee to do it. In Order No. 693, the Commission itself also declined to do so.<sup>34</sup>

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<sup>34</sup> *Mandatory Reliability Standards for the Bulk-Power System*, 118 FERC ¶ 61,218, FERC Stats. & Regs. ¶ 31,242 at PP 107, 141 (2007) (Order No. 693).



**3. DOE/PPPO's arguments that the Portsmouth site does not materially impact the BPS were given due consideration.**

With respect to DOE/PPPO's claims that its facilities are not material to the reliability of the BPS, as the NERC BOTCC Decision notes, RFC expressly rejected these arguments. Moreover, whether a user, owner or operator is material to the reliable operation of the interconnected bulk power system is defined by the NERC *Registry Criteria*. As the NERC *Registry Criteria* states:

Organizations will be responsible to register and to comply with approved reliability standards to the extent that they are owners, operators, and users of the bulk power system, perform a function listed in the functional types identified in Section II of this document, and *are material to the reliable operation of the interconnected bulk power system as defined by the criteria and notes set forth in this document.*<sup>35</sup>

That is, the criteria itself defines, as an initial matter, whether an entity is material to the reliability of the BPS. Here, based on a straightforward application of the criteria, the NERC BOTCC Decision adequately supported the registration of DOE/PPPO as a TO, TOP, LSE and DP pursuant to NERC's plenary authority to register entities that own or operate assets that are "material to the reliability of the bulk power system."<sup>36</sup>

DOE/PPPO contends that its studies and models show that its electrical system has overlapping zones of relay protection that have been proven to be effective and should support a finding that the facilities are not material to the BPS. Those studies were completed based on a 1976 bulk power system configuration and loads and for a differing purpose than to strictly determine materiality as it relates to compliance with mandatory reliability standards. However, it goes without saying that good utility

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<sup>35</sup> NERC *Registry Criteria* at 1 (emphasis added).

<sup>36</sup> *New Harquahala Generating Co., LLC*, 123 FERC ¶ 61,173 at P 44 and n.51 (2008) (citing NERC *Registry Criteria*, Notes to *Criteria*, note 1 (footnote excluded); see also NERC Rules of Procedure, Rule 501.1.2.6.).

practice requires that protection systems be effective. Such protection systems, however, in and of themselves are insufficient to render DOE/PPPO's facilities immaterial to the reliability of the BPS.

**B. The Commission Should Decline to Grant A Stay.**

In its appeal, DOE/PPPO requests that the Commission stay the registry of DOE/PPPO as a TO, TOP, DP and LSE for the Portsmouth site. DOE/PPPO claims that it will suffer irreparable injury if the stay is not granted, by incurring costs associated with implementing and maintaining compliance with reliability standards.<sup>37</sup> According to DOE/PPPO it will have to expend millions of taxpayers' dollars to comply with the applicable standards primarily for "procedural and administrative" requirements, such as obtaining certification for the switchyard operators, that cannot be recouped if its appeal is successful.<sup>38</sup> DOE/PPPO has offered no quantification of the harm it claims it might suffer.

The Commission has denied requests for stay,<sup>39</sup> even with respect to registration appeals,<sup>40</sup> where an entity claims irreparable harm but does not provide financial information or documentation to support its claim. According to the Commission,

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<sup>37</sup> DOE/PPPO FERC Appeal at 1, 8.

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,631 (1991) ("In deciding whether a stay would be appropriate in a particular case, we generally consider several factors: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest."), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993); *Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000); *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,142 at P 18 (2005); *Applicability of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,320 at P 8 ("Order Denying Stay") (2007), *as amended by the Errata Notice*, Docket No. RM07-11-000 (2007), *reh'g denied*, 120 FERC ¶ 61,098 (2007) ("Order Denying Rehearing"). See also *Mosaic Fertilizer, LLC, et al.*, 121 FERC ¶ 61,058 (2007). According to the Commission, if a party is unable to demonstrate that it will suffer irreparable harm absent a stay, it need not examine the other factors. See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,142 at P 18 (citing *CMS Midland, Inc.*, 56 FERC at 61,631).

<sup>40</sup> See Order Denying Stay, 119 FERC ¶ 61,320 at P 8, *as amended by the Errata Notice*. See also Order Denying Rehearing, 120 FERC ¶ 61,098.

“unsupported claims that they will have to incur financial costs that may not be recoverable is insufficient, both factually and legally, to demonstrate the need for a stay while they appeal the registration determinations.”<sup>41</sup> Here, DOE/PPPO has provided no evidence of verifiable quantification of irreparable harm. Therefore, the Commission should decline to grant a stay.<sup>42</sup>

## V. 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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<sup>41</sup> Order Denying Request for Rehearing, 120 FERC ¶ 61,098 at P 11.

<sup>42</sup> *Mosaic Fertilizer, LLC, et al.*, 121 FERC ¶ 61,058 at P 35 and n.3 (2007).

**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 12th day of June, 2008.

*/s/ Rebecca J. Michael*  
Rebecca J. Michael

*Attorney for North American Electric  
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