

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability  
Corporation

Docket No. RR15-2-000

**MOTION TO INTERVENE AND COMMENTS OF  
THE AMERICAN PUBLIC POWER ASSOCIATION,  
THE ELECTRICITY CONSUMERS RESOURCE  
COUNCIL, THE LARGE PUBLIC POWER  
COUNCIL, THE NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION, AND THE  
TRANSMISSION ACCESS POLICY STUDY GROUP  
REGARDING RELIABILITY ASSURANCE  
INITIATIVE**

On November 3, 2014, the North American Electric Reliability Corporation (“NERC”) submitted an informational filing regarding its Reliability Assurance Initiative (“RAI”).<sup>1</sup> Pursuant to the Commission’s November 5, 2014 Combined Notice of Filings #1,<sup>2</sup> the American Public Power Association (“APPA”), the Electricity Consumers Resource Council (“ELCON”), the Large Public Power Council (“LPPC”), the National Rural Electric Cooperative Association (“NRECA”) and the Transmission Access Policy Study Group (“TAPS”) (collectively referred to as “Joint Commenters”) hereby move to intervene in this proceeding and comment on NERC’s RAI Filing. Joint Commenters support this important NERC initiative. The time for RAI has come. We also are encouraged by NERC’s commitment to address concerns about how RAI is applied to smaller entities. We nonetheless urge the Commission to require greater transparency, at

---

<sup>1</sup> Informational Filing Regarding Implementation of the Reliability Assurance Initiative of the North American Electric Reliability Corporation, Nov. 3, 2014, *Reliability Assurance Initiative*, Docket No. RR15-2-000, eLibrary No. 20141103-5199 (“RAI Filing”).

<sup>2</sup> Combined Notice of Filings #1, eLibrary No. 20141105-3043.

least for the first two years of RAI implementation, of the treatment of individual instances of noncompliance as “compliance exceptions.”

#### **I. MOTION TO INTERVENE**

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve over 47 million people, doing business in every state except Hawaii. Public power systems own approximately 10.3% of the total installed generating capacity in the United States. Approximately 300 APPA members are subject to compliance with NERC standards applicable to users, owners and operators of the Bulk-Power System (“BPS”).

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and consume power in the footprints of all organized markets and other regions throughout the United States.

LPPC is an association of 26 of the nation's largest municipal and state-owned utilities, located in eleven states in all regions of the nation. LPPC speaks for the larger asset-owning members of the public power community.

NRECA is the national service organization for more than 900 not-for-profit rural electric cooperatives and public power districts providing retail electric service to more than 42 million customers in 47 states. NRECA’s members include consumer-owned local distribution systems and 65 generation and transmission cooperatives that supply wholesale power to their distribution cooperative owner-members.

TAPS is an association of transmission-dependent utilities (“TDUs”) in more than 35 states, promoting open and non-discriminatory transmission access.<sup>3</sup> TAPS members have long recognized the importance of grid reliability. As TDUs, TAPS members are users of the BPS, highly reliant on the reliability of facilities owned and operated by others for the transmission service required to meet TAPS members’ loads. In addition, many TAPS members participate in the development of and are subject to compliance with NERC Reliability Standards.

Members represented by Joint Commenters are directly affected by NERC’s filing, which describes a fundamental transition in the manner in which the ERO Enterprise, including NERC and each of its Regional Entities, focuses its compliance and enforcement activities on risks to the reliable planning and operation of the BPS. Joint Commenters have clear and substantial interests in this proceeding that cannot be represented by any other party, and their participation would be in the public interest. APPA, ELCON, LPPC, NRECA, and TAPS should each be granted intervention.

---

<sup>3</sup> Duncan Kincheloe, Missouri Joint Municipal Electric Utility Commission, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

Communications regarding these proceedings should be directed to:<sup>4</sup>

For APPA

Delia Patterson, General Counsel  
Allen Mosher, Vice President,  
Policy Analysis  
Randolph Elliot, Regulatory Counsel  
AMERICAN PUBLIC POWER  
ASSOCIATION  
2451 Crystal Dr., Suite 1000  
Arlington, VA 22202  
Tel.: (202) 467-2900  
Fax: (202) 467-2918  
E-mail: dpatterson@publicpower.org  
amosher@publicpower.org  
relliott@publicpower.org

For APPA, NRECA, and TAPS

Cynthia S. Bogorad  
Rebecca J. Baldwin  
Latif M. Nurani  
SPIEGEL & MCDIARMID LLP  
1875 Eye Street, NW  
Suite 700  
Washington, DC 20006  
Tel.: (202) 879-4000  
Fax: (202) 393-2866  
E-mail: cynthia.bogorad@spiegelmc.com  
rebecca.baldwin@spiegelmc.com  
latif.nurani@spiegelmc.com

For TAPS

John Twitty, Executive Director  
TRANSMISSION ACCESS POLICY  
STUDY GROUP  
4203 E. Woodland St.  
Springfield, MO 65809  
Tel.: (417) 838-8576  
E-mail: 835consulting@gmail.com

For LPPC

Jonathan D. Schneider  
Jonathan P. Trotta  
STINSON LEONARD STREET LLP  
1775 Pennsylvania Avenue, NW, Suite 800  
Washington, DC 20006  
Tel.: (202) 785-9100  
E-mail: jschneider@stinson.com  
Jonathan.trotta@stinsonleonard.com

For NRECA

Paul M. Breakman, Associate Director –  
Regulatory Counsel  
Barry Lawson, Associate Director –  
Power Delivery & Reliability  
NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION  
4301 Wilson Boulevard  
Arlington, VA 22203  
Tel.: (703) 907-5844  
E-mail: paul.breakman@nreca.coop  
barry.lawson@nreca.coop

For ELCON

John P. Hughes  
Vice President – Technical Affairs  
ELECTRICITY CONSUMERS RESOURCE  
COUNCIL  
1101 K Street, NW, Suite 7000  
Washington, DC 20005  
Tel.: (202) 682-1390  
E-mail: jhughes@elcon.org

---

<sup>4</sup> To the extent necessary and in order to expedite communications, we request waiver of 18 C.F.R. § 385.203(b)(3) to allow multiple addresses to be placed on the official service list, because this motion to intervene is filed on behalf of multiple trade associations.

## II. COMMENTS

### A. *Joint Commenters Support RAI*

Joint Commenters support RAI as a needed, if not overdue, reform. The time is right for NERC to move away from a zero tolerance approach to compliance and enforcement of NERC standards, and better focus ERO Enterprise compliance and enforcement efforts on the basis of risk, thereby enhancing reliability.

NERC's approach is consistent with the Commission's recent support, in the context of reviewing NERC's CIP version 5 standards, for moving away from the zero-tolerance approach to compliance,<sup>5</sup> and "encouraging the development of strong internal controls and focusing resources on activities that best promote reliability of the Bulk-Power System."<sup>6</sup> While directing NERC to remove the "identify, assess, and correct" language from the CIP standards, the Commission stated:<sup>7</sup>

We believe, however, that it may be more appropriate for NERC to achieve these goals by articulating defined goals in the compliance and enforcement process and identifying clear expectations that would justify the exercise of enforcement discretion. For example, the Reliability Assurance Initiative process when fully developed may afford a consistent, informed approach that provides incentives for entities to develop robust internal control programs.

Joint Commenters support NERC's effort, through RAI, to employ a risk-based approach to compliance monitoring. It makes sense for NERC to develop its annual Compliance Monitoring and Enforcement Implementation Plan based on an assessment of risk (both continent-wide and regional), and for Regional Entities to scope their compliance monitoring efforts for individual registered entities based on their assessment

---

<sup>5</sup> *Version 5 Critical Infrastructure Protection Reliability Standards*, 145 FERC ¶ 61,160, P 69 (2013).

<sup>6</sup> *Id.* P 73.

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

(shared with the registered entity) of the entity’s “Inherent Risk.” It also is smart for NERC and its Regional Entities to leverage a registered entity’s “Internal Controls” (based on an assessment also shared with the registered entity) to further refine the scope of their compliance activities, to the extent warranted. NERC’s exercise of enforcement discretion to focus compliance and enforcement activities in relation to risk is a natural evolution and maturation of the ERO Enterprise, better enabling it to effectively and efficiently perform its role in FPA Section 215’s regulatory scheme for development and enforcement of reliability standards.

Other aspects of RAI similarly are a logical outgrowth of this same maturation process. The movement from “Find, Fix, Track, and Report” (“FFT”) to “compliance exceptions” and the provision for self-logging minimal-risk non-compliance should be particularly helpful in focusing resources of all involved as we move towards implementation of CIP version 5 standards.

APPA, NRECA, and TAPS have raised questions before NERC as to how the scoping of audits and other elements of RAI could be meaningfully applied to small and medium-sized registered entities. For example, a number of the factors identified in NERC’s Inherent Risk Assessment (“IRA”) are more sensibly applied to larger entities than small entities,<sup>8</sup> as are a number of the factors to be considered in an Internal Controls Evaluation (“ICE”).<sup>9</sup> In response, NERC has rightly recognized the need to

---

<sup>8</sup> For example, NERC’s *ERO Enterprise Inherent Risk Assessment Guide*, available at [http://www.nerc.com/pa/comp/Reliability%20Assurance%20Initiative/ERO\\_Enterprise\\_Inherent\\_Risk\\_Assessment\\_Guide\\_20141010.pdf](http://www.nerc.com/pa/comp/Reliability%20Assurance%20Initiative/ERO_Enterprise_Inherent_Risk_Assessment_Guide_20141010.pdf), states that having a “limited array of power sources and back up choices for power” (at 18) and “limited or no formal internal compliance function” (at 19) are possible criteria for designating an entity as high risk. While those criteria may be appropriate for large entities, their application would wrongly identify the smallest entities as high risk, as NERC acknowledges (at 7): “some risk factors that one might associate as contributory towards determining overall inherent risk of an entity for a larger entity may contribute differently to the evaluation of a smaller entity.”

<sup>9</sup> For example, NERC’s *ERO Enterprise Internal Control Evaluation Guide*, available at <http://www.nerc.com/pa/comp/Reliability%20Assurance%20Initiative/ERO%20Enterprise%20Internal%20>

make both IRA and ICE scalable, and that factors may be applied differently to assess the risk and internal controls of smaller entities than when applied to larger entities.<sup>10</sup> As NERC's decision to make ICE optional implicitly acknowledges, merely performing the ICE evaluation may impose burdens on such low-risk entities and the ERO Enterprise that are disproportionate to potential benefits.<sup>11</sup> Nevertheless, assessment of a registered entity's internal controls remains a factor in assessing the availability of compliance exceptions<sup>12</sup> and NERC's self-logging program,<sup>13</sup> creating the potential unintended consequence that non-compliance by small, low-risk entities may be subjected to compliance and enforcement actions disproportionate with the risks posed by such noncompliance. NERC should avoid such inappropriate and discriminatory results, which are plainly at odds with its risk-focused objectives, by directly addressing the treatment of small, low-risk entities in its RAI training and implementation review efforts.

As part of an effort to address these concerns, NERC has included, as part of its RAI implementation plan for early 2015, a "[t]abletop discussion with small entities."<sup>14</sup> APPA, NRECA, and TAPS look forward to working with NERC to develop a refined

---

Control%20Evaluation%20Guide.pdf, describes "Fully Implemented" internal controls as including "[m]ultiple self-monitoring internal controls, most of which cannot be overridden without management notification/resolving issue" (at 12). But such controls may be unnecessary and unduly burdensome for a small entity, as NERC recognizes (at 14).

<sup>10</sup> See RAI Filing at 26-27 (scaling IRA) and 33-34 (concerning scaling of ICE).

<sup>11</sup> See RAI Filing at 24 (diagram) and 33-34 (after the IRA, few standards may remain as part of the monitoring scope for an entity posing small inherent risk).

<sup>12</sup> See RAI Filing at 46.

<sup>13</sup> See RAI Filing at 56.

<sup>14</sup> See Sonia Mendonca, NERC Board of Trustees Compliance Committee, *Reliability Assurance Initiative*, at 4 (Nov. 12, 2014), <http://www.nerc.com/gov/bot/BOTCC/Compliance%20Committee%202013/November%2012%20Compliance%20Committee%20Presentations.pdf>.

understanding of how the IRA and ICE can be scaled for small entities in a consistent manner.

***B. Successful and Effective Implementation of RAI Requires Greater Transparency for at Least Two Years***

As NERC itself acknowledges, RAI is a fundamental transformation in its approach to compliance and enforcement.<sup>15</sup> Joint Commenters recognize the steps NERC has taken and is taking to work closely with Regional Entities in developing and piloting RAI, and training the Regional Entity personnel who will be charged with implementing RAI. We also appreciate that RAI relies on the sound exercise of discretion. However, consistency in both process and, within a reasonable range, outcomes is essential to the integrity and validity of NERC's reliability standard compliance and enforcement program, consistent with FPA Section 215.<sup>16</sup> At this early stage of RAI implementation, there is no assurance that NERC and the Regional Entities will perform risk assessment of registered entities on a consistent basis. Nor can the Commission or the industry be assured that ICE will be consistently applied both across the various Regional Entities and within a particular Regional Entity.<sup>17</sup>

Despite the transformation to be effected by RAI, NERC's RAI Filing contemplates reduced visibility to the industry. Unlike FFT postings, NERC does not

---

<sup>15</sup> See, e.g., RAI Filing at 21; NERC, *White Paper No. 2: Restyle the Compliance Monitoring Approach*, at 2 (Nov. 26, 2012), (<http://www.nerc.com/pa/comp/Reliability%20Assurance%20Initiative/Paper%20No.%202%20E2%80%90%20Restyle%20the%20Compliance%20Monitoring%20Approach%20%28Change%20State%20Element%20No.%201%29.pdf>).

<sup>16</sup> See, e.g., Section 215(c)(2)(C) (requiring "fair and impartial procedures for enforcement of reliability standards"); Section 215(e)(6) ("[a]ny penalty imposed ... shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner").

<sup>17</sup> See *N. Am. Elec. Reliability Corp.*, 148 FERC ¶ 61,214, P 36 (2014) (noting the need for NERC to demonstrate that it was ensuring appropriate levels of consistency across the Regions with regard to the assessment of internal controls as applied to accord FFT treatment to moderate-risk violations).



intend to make individual compliance exceptions publicly available. Instead, NERC expects to issue annual reports on its program, which will include observed trends by region, standard and category, and some examples.<sup>18</sup> NERC views greater transparency as an inappropriate disclosure of its exercise of enforcement discretion, an invasion of the privacy of the registered entities involved, and a diversion of attention from higher-risk non-compliance.<sup>19</sup> NERC states:<sup>20</sup>

[P]osting of individual accounts of trivial instances of noncompliance does not provide a benefit and diverts resources from the ERO Enterprise that should be allocated elsewhere.

Joint Commenters strongly disagree. Greater transparency, particularly in the first two transitional years as the ERO Enterprise gains experience with implementation of RAI, is essential to educating industry to avoid and mitigate noncompliance with reliability standards, and to maintain the credibility of NERC's compliance and enforcement regime.

What NERC terms "trivial instances of noncompliance" to be addressed through compliance exceptions presumably covers much of the minimal-risk violations now disclosed in monthly FFT postings. Through review and analysis of the searchable FFT spreadsheets, registered entities can learn what actions cause noncompliance and how such noncompliance can be mitigated. The information provided in these spreadsheets helps registered entities spot pitfalls to avoid, and provides guidance on approaches to curing such deficiencies. The "trivial instances of noncompliance" to be treated as compliance exceptions would similarly provide useful lessons, especially as the industry

---

<sup>18</sup> RAI Filing at 51, 53.

<sup>19</sup> *Id.* at 52-53.

<sup>20</sup> *Id.* at 53.

struggles with the upcoming implementation challenges associated with CIP version 5 standards. This is the wrong time to impose confidentiality on useful training tools.

Disclosure of individual instances of noncompliance treated as compliance exceptions is also critical to maintaining the integrity of NERC's processes and gaining industry confidence as NERC makes this major transition. Such disclosure will enable registered entities to perform their own assessments as to whether the various Regional Entities are implementing RAI in a consistent manner, and achieving reasonably consistent outcomes. Annual reports, which necessarily reflect selectivity in the trends disclosed, are no substitute for the continued availability of searchable spreadsheets.

Indeed, in its recent order on NERC's Five-Year Performance Assessment, the Commission explicitly recognized the need for continued transparency as NERC implements RAI:<sup>21</sup>

NERC should continue to promote transparency in its enforcement programs, *particularly as it moves forward with its Reliability Assurance Initiative*, given the value of transparency in encouraging full and adequate mitigation practices and in providing assurance to the Commission, registered entities, and the public that the program is being fairly and consistently implemented across all regions. We note that the FFT program created efficiencies in the ERO Enterprise's enforcement process, without the need to sacrifice any degree of transparency in the form of current public disclosure regarding FFT-processed violations. Therefore, we expect NERC to continue making information publicly available concerning possible non-compliance (other than those involving physical security or cybersecurity concerns) resolved through any and all processing methods.

Nor is public disclosure of compliance exceptions an undue burden on NERC or undue intrusion into its exercise of discretion. NERC already contemplates maintaining

---

<sup>21</sup> *N. Am. Elec. Reliability Corp.*, 149 FERC ¶ 61,141, P 72 (2014) (emphasis added).

visibility to this Commission of all identified instances of non-compliance,<sup>22</sup> through a version of the FFT spreadsheet adapted for compliance exceptions.<sup>23</sup> Public posting of such spreadsheets would not materially increase NERC's workload. To the extent the Commission determines that it is appropriate to allow NERC to mask the identity of the registered entities involved in compliance exceptions,<sup>24</sup> NERC could apply the same practice it has used with regard to CIP FFTs.

In short, the benefits of transparency far outweigh the burden, at least until NERC and its Regional Entities have a demonstrated track record in RAI implementation that gives the Commission and industry sufficient confidence to conclude that continued transparency to the same degree is unnecessary. Thus, Joint Commenters ask that at least for the initial two years of implementation of RAI, NERC be required to maintain transparency of compliance exceptions comparable to the transparency now accorded FFTs.<sup>25</sup> After that initial period, and with the benefit of preferably two RAI annual reports, the Commission, with input from the industry and other stakeholders, can assess whether that level of transparency should be continued.

---

<sup>22</sup> RAI Filing at 54.

<sup>23</sup> RAI Filing at 57-58.

<sup>24</sup> In its initial FFT informational filing, NERC had proposed that its monthly FFT informational filings would not publicly disclose identification of registered entities. The Commission generally rejected that approach (which has resulted in public disclosure of non-CIP FFTs), finding that disclosing the identity of the registered entity is permissible, and desirable in that it promotes deterrence and accountability, and "will provide industry with valuable information on compliance issues." *N. Am. Elec. Reliability Corp.*, 138 FERC ¶ 61,193, PP 67-68 (2012).

<sup>25</sup> This transparency obligation should include compliance exceptions that result from self-logging, with public postings on a periodic basis, consistent with the timing when logs are made available for review by NERC (i.e., initially every three months (RAI Filing at 58)).

## CONCLUSION

For the reasons discussed above, the Commission should grant APPA, ELCON, LPPC, NRECA, and TAPS intervention in this proceeding, accept NERC's RAI Filing, and support NERC's efforts to refocus compliance and enforcement on the basis of risk.

At least for the initial two years of RAI implementation, however, the Commission should require NERC to maintain public transparency for instances of noncompliance treated as compliance exceptions to the same degree it now provides transparency for FFTs. The relative benefits and burdens of continuing such transparency beyond the initial two years can be reassessed after the conclusion of the initial two-year period.

Respectfully submitted,

Jonathan D. Schneider  
Jonathan P. Trotta  
STINSON LEONARD STREET LLP  
1775 Pennsylvania Avenue, NW  
Suite 800  
Washington, DC 20006  
(202) 785-9100  
jschneider@stinson.com  
Jonathan.trotta@stinsonleonard.com

Attorneys for the  
Large Public Power Council

John P. Hughes  
Vice President – Technical Affairs  
ELECTRICITY CONSUMERS RESOURCE COUNCIL  
1101 K Street, NW, Suite 7000  
Washington, DC 20005  
(202) 682-1390

/s/ Cynthia S. Bogorad  
Cynthia S. Bogorad  
Rebecca J. Baldwin  
Latif M. Nurani  
SPIEGEL & MCDIARMID  
1875 Eye Street, NW  
Suite 700  
Washington, DC 20006  
(202) 879-4000

Attorneys for American Power  
Association, National Rural Electric  
Cooperative Association and the  
Transmission Access Policy Study  
Group

December 3, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 3rd day of December, 2014.

/s/ Cynthia S. Bogorad  
Cynthia S. Bogorad

Law Offices of:  
Spiegel & McDiarmid LLP  
1875 Eye Street, NW  
Suite 700  
Washington, DC 20006  
(202) 879-4000