

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Corporation

Docket No. RR09-6-000

MOTION TO INTERVENE, REQUEST FOR CLARIFICATION, AND, IN THE ALTERNATIVE, REQUEST FOR REHEARING OF THE EDISON ELECTRIC INSTITUTE, THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, THE CANADIAN ELECTRICITY ASSOCIATION, THE LARGE PUBLIC POWER COUNCIL, THE TRANSMISSION ACCESS POLICY STUDY GROUP, AND THE ELECTRICITY CONSUMERS RESOURCE COUNCIL

Pursuant to Rules 212, 214, and 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.214, and 385.713, and pursuant to 18 C.F.R. § 39.10(c), the Edison Electric Institute ("EEI"), the American Public Power Association ("APPA"), the National Rural Electric Cooperative Association ("NRECA"), the Canadian Electricity Association ("CEA"), the Large Public Power Council ("LPPC"), the Transmission Access Policy Study Group ("TAPS"), and the Electricity Consumers Resource Council ("ELCON") (collectively referred to as "Trade Associations") hereby request leave to intervene in the above-captioned proceeding and submit this request for clarification or, in the alternative, rehearing of the Federal Energy Regulatory Commission's ("FERC" or "Commission") "Order Directing NERC to Propose Modification of Electric Reliability Organization Rules of Procedure," issued March 18, 2010 in this docket ("ROP Order").¹ In the ROP Order, FERC directed NERC to propose modifications that pertain to the development of reliability standards.

¹ *North Am. Elec. Reliability Corp.*, 130 F.E.R.C. ¶ 61,203 (2010).

I. MOTION TO INTERVENE

A. *Description of Trade Associations Joining This Filing and Their Interest in This Proceeding*

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 (“kWh”) sales to ultimate customers, and do business in every state except Hawaii. Approximately 1,840 of these systems are cities and municipal governments that currently own and control the day-to-day operation of their electric utility systems. Collectively, public power systems serve 45 million people. Public power systems own about eight percent of the nation’s high-voltage transmission lines (138 kilovolts (“kV”) or greater), although many of these lines are configured to deliver energy to their own load centers, and not to provide transmission service in interstate commerce.

APPA participated in the coalition of industry trade associations that helped to develop the statutory language that eventually became FPA Section 215 (16 U.S.C. § 824o) upon the passage of the Energy Policy Act of 2005.² APPA has since participated actively in reliability-related industry activities on behalf of the nation’s publicly owned electric utilities, including numerous dockets before this Commission implementing the Commission’s and the North American Electric Reliability Corporation’s (“NERC”) responsibilities under the Section 215 mandatory reliability regime.

² Energy Policy Act of 2005 § 1211(a), 16 U.S.C. § 824o.

Founded in 1891, the Canadian Electricity Association (CEA) is the national forum and voice of the evolving electricity business in Canada. CEA contributes to the regional, national and international success of its members through the delivery of quality value-added services. At the heart of CEA is a core of corporate utility member companies. In addition, major electrical manufacturers and corporate consulting companies and several hundred other company and individual members are grouped within CEA's broad structure. CEA members generate, transmit and distribute electrical energy to industrial, commercial, residential, and institutional customers across Canada every day. From vertically integrated electric utilities, to power marketers, to the manufacturers and suppliers of materials, technology and services that keep the industry running smoothly – all are represented by this national industry association.

EEI is the association of the nation's shareholder-owned electric utilities and affiliates and associates world-wide. EEI's members serve 95% of the ultimate customers in the shareholder-owned segment of the industry and represent approximately 70% of the U.S. power industry. EEI's members are owners, operators, and users of the bulk power system and are subject to the Reliability Standards established by the ERO. Many EEI members will be required to comply with FAC-008 and other Reliability Standards that may be subject to a directive for modification by the Commission.

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 are consumers of electricity throughout the United States.

The Large Public Power Council represents 23 of the nation's largest state and municipal utilities. The members belong to APPA, but are among the larger, asset-owning members of the public power community.

NRECA is the not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives. The great majority of these cooperatives are distribution cooperatives that provide retail electric service to over 42 million consumer-owners in 47 states. Kilowatt-hour sales by rural electric cooperatives account for approximately 10% of total electricity sales in the United States. In addition, NRECA members include approximately 66 generation and transmission (“G&T”) cooperatives that supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide electric service to their owner-members at the lowest reasonable cost consistent with adequate and reliable service.

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.³ As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members recognize the importance of a reliable bulk power system.

A significant number of the members of each of these Trade Associations are subject to the reliability standards developed by the North American Electric Reliability

³ TAPS is chaired by Roy Thilly, CEO of WPPI Energy (“WPPI”). Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power, Inc.; Blue Ridge Power Agency; Clarksdale Public Utilities; Connecticut Municipal Electric Energy Cooperative; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric; Missouri Public Utility Alliance; Missouri River Energy Services; NMPP Energy; Northern California Power Agency; Oklahoma Municipal Power Authority; and Southern Minnesota Municipal Power Agency.

Corporation (“NERC”). As a result, each Trade Association has a direct interest in the manner in which reliability standards are developed. Because the ROP Order would affect how reliability standards are modified by NERC, the members of the respective Trade Associations will be impacted by this Order. Each of the Trade Associations therefore moves for leave to intervene in the above-captioned proceeding with full rights as a party.

Although intervention is typically not permitted at the rehearing stage, Trade Associations’ instant motion for intervention should be allowed. The Commission’s issuance of its ROP Order in a new docket precluded earlier intervention, providing good cause for intervention at this first opportunity. Each of the Trade Associations was a participant in the rulemaking proceeding leading up to Order No. 693,⁴ to which this Order pertains (at least in part), and each of the Trade Associations with the exception of LPPC participated in the Order No. 672⁵ proceeding, to which this Order is also closely related. The Commission should not be able to frustrate the Trade Associations’ participation and intervention rights by issuing orders in separate dockets without providing notice and an opportunity to comment or intervene. Further, nothing in the Federal Power Act envisions FERC “directing” NERC to change its Rules of Procedure

⁴ Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, 72 Fed. Reg. 16,416 (Apr. 4, 2007), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,242, *effective date stayed*, 72 Fed. Reg. 31,452 (June 7, 2007) (“Order No. 693”), *aff’d*, Order No. 693-A, 72 Fed. Reg. 40,717 (July 25, 2007), 120 F.E.R.C. ¶ 61,053 (2007) (“Order No. 693-A”).

⁵ Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672, 71 Fed. Reg. 8662 (Feb. 17, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,204, *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006) (“Order No. 672”), *on reh’g*, Order No. 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,212, *modified*, 73 Fed. Reg. 21,814 (Apr. 23, 2008), 123 F.E.R.C. ¶ 61,046 (2008) (“Order No. 672-A”).

without opportunity for public comment. FPA § 215(f), 16 U.S.C. § 824o(f); 18 C.F.R. § 39.10.⁶

The Trade Associations' motion to intervene cannot be deemed to be out-of-time because there was no earlier opportunity to intervene in this proceeding. In any event, the Commission's rules permit it to grant even late intervention for good cause,⁷ and the Commission summarily grants out-of-time interventions in cases that will not disrupt the proceedings or place additional burdens on existing parties on a regular basis.⁸ Where, as here, the Commission issued an order significantly impacting the members of the Trade Associations without first affording any opportunity for intervention or comment, the Trade Associations' motion to intervene is timely and this request for rehearing or clarification should be heard.

B. *Communications*

The persons to whom communications concerning this matter should be addressed, and their contact information, are as follows:⁹

⁶ Pursuant to 18 C.F.R. § 39.10(c), any change to the Electric Reliability Organization ("ERO") Rules takes effect upon a finding by the Commission, "after notice and opportunity for public comment," that the change is "just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of § 39.3." The ROP Order directs the substance of the change to the ERO Rules; only the form is left to NERC's discretion.

⁷ 18 C.F.R. § 385.214(d). The Trade Associations have good cause for not intervening "within the time prescribed" because no time for interventions in this docket has been prescribed. 18 C.F.R. § 385.214(d)(1)(i). Granting this motion to intervene will not disrupt the proceeding, which has just begun, nor will it burden any existing parties; moreover, the Trade Associations are willing to accept the record as it currently stands. 18 C.F.R. §§ 385.214(d)(1)(i), (iv). No other party to the proceeding can adequately represent the interests of the Trade Associations. 18 C.F.R. § 385.214(d)(1)(iii).

⁸ See *MarkWest Pioneer, L.L.C.*, 129 F.E.R.C. ¶ 61,290, P 6 (2009); Letter Order from Daniel J. Nowak, Acting Director, Division of Electric Power Regulation-East, FERC, to Gary A. Morgans, Esq., Steptoe & Johnson LLP, at 1 (Dec. 17, 2009) (available at eLibrary Accession No. 20091217-3080); *Questar Pipeline Co.*, 119 F.E.R.C. ¶ 61,077, at P 19 (2007).

⁹ The Trade Associations respectfully request that the Commission waive Rule 203(b)(3) and allow additional service in view of the fact that each Trade Association is a separate entity, and to facilitate communications.

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II. REQUEST FOR CLARIFICATION OR REHEARING

A. *Introduction*

In its Order, FERC explains that it is issuing its directive to NERC because it is concerned that NERC’s balloting and voting processes may not allow NERC to comply with FERC directives to submit new or modified reliability standards. First, FERC is concerned that a minority of voters could vote against a reliability standard, preventing it from being submitted to FERC for review, “even in circumstances where the Standard would have complied with the Commission’s directive.” ROP Order P 3. FERC is also concerned that “a team of industry volunteers that may or may not agree with the Commission’s directive” could develop a new or modified draft that is not responsive to a Commission directive. *Id.* P 4. FERC maintains that, once a Commission directive is final, the participants in NERC’s standard development process “do not have the discretion to simply ignore the directive or develop provisions to a new or revised Reliability Standard that clearly contradicts the plain understanding of the Commission

directive.” *Id.* P 23. FERC concludes that NERC does not have discretion not to comply with FERC’s directive.

The Trade Associations recognize that FERC must have assurances that, once directed to address a matter, NERC will be able to submit a standard addressing the matter to FERC. To the extent the ROP Order addresses only the issue of assuring that the NERC Rules of Procedure provide for a standard to be submitted to FERC in response to an order directing NERC to address a specific matter, pursuant to Section 215(d)(5) of the FPA (16 U.S.C. § 824o(d)(5)), the Trade Associations are not challenging the directive that NERC modify its Rules of Procedure. The Trade Associations request that the Commission clarify that its Order is limited to this issue.

If, however, FERC is also directing that NERC modify its Rules of Procedure to ensure that NERC modifies reliability standards consistent with FERC directives as to the specific technical content of those standards, the Trade Associations request rehearing. Such directives would be inconsistent with the language and intent of Section 215, which gives FERC the authority to accept or remand a standard, but not to draft a standard, and requires FERC to “give due weight to [NERC’s] technical expertise.” FPA § 215(d)(2); 16 U.S.C. § 824o(d)(2). Moreover, such modifications would undermine effective Canadian participation in the NERC standards development process. Canadian participation during the process for drafting or modifying a particular standard may, for example, result in changes to the content of a standard that differ from the FERC directive, and FERC’s suggestion that such changes are not permissible is contrary to the statutory framework. To the extent that the ROP Order would require NERC to modify

its Rules of Procedure in a manner inconsistent with Section 215, the Trade Associations request that FERC strike such directive from its Order.¹⁰

B. Statement of Issues Required by 18 C.F.R. § 385.713(c)(2)

1. Whether, to the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission's Order is arbitrary, capricious, and otherwise contrary to law because it violates the plain language and intent of Section 215 of the FPA. These issues include but are not limited to:
 - a) Whether, to the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission's Order is contrary to the plain language and intent of Section 215 of the FPA, under which reliability standards are drafted by the ERO and approved or remanded by FERC. FPA § 215, 16 U.S.C. § 824o;
 - b) Whether, to the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission's Order is contrary to the plain language and intent of Section 215 of the FPA, which directs FERC to give due weight to the technical expertise of the ERO. FPA § 215, 16 U.S.C. § 824o;
 - c) Whether, to the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission's Order is in conflict with the plain language and intent of Section 215 of the FPA,

¹⁰ In its Order, FERC also appears to suggest that the NERC drafting teams ignore FERC directives, using as an example the FERC directives with respect to modifications to FAC-008-1. In terms of FAC-008-1, this was clearly not the case. As with all directives regarding standards modifications, the drafting team fully considered the FERC directives. But as explained in this Request for Clarification or Rehearing, NERC drafting teams must be free to make an informed judgment, from a reliability perspective, on whether FERC's guidance as to the technical content of a standard should be adopted.

which recognizes that NERC must be able to function as an international standards-setting organization. FPA § 215, 16 U.S.C. § 824o;

- d) Whether, to the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission's Order is in conflict with the plain language and intent of Section 215 of the FPA, which requires that the ERO—not FERC—must “provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties.” FPA § 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D);
2. Whether, to the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission's Order is arbitrary, capricious, and otherwise contrary to law and should therefore be revised appropriately on rehearing. FPA § 215, 16 U.S.C. § 824o; FPA § 313(b), 16 U.S.C. § 824l(b); 5 U.S.C. § 706(2)(A), (C), (D); U.S. Dep't of Energy, Maintaining Reliability in a Competitive U.S. Electricity Industry: Final Report of the Task Force on Electric System Reliability, 61, 67, 68 (Sept. 29, 1998), *available at* <http://www.nerc.com/docs/docs/pubs/esrfinal.pdf>; *Electric Restructuring Legislation: Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Commerce*, 106th Cong. 19 (1999) (statement of Bill Richardson, Secretary, U.S. Department of Energy), 148 Cong. Rec. 3217-42 (2002); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999); *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984); *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 94 (D.C Cir. 2001); *Associated Gas Distrib. v. FERC*, 899 F.2d 1250, 1263 (D.C. Cir. 1990); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672, 71 Fed. Reg. 8662 (Feb. 17, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,204, *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006) (“Order No. 672”), *on*

reh’g, Order No. 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,212, *modified*, 73 Fed. Reg. 21,814 (Apr. 23, 2008), 123 F.E.R.C. ¶ 61,046 (2008) (“Order No. 672-A”); Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, 72 Fed. Reg. 16,416 (Apr. 4, 2007), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,242, *effective date stayed*, 72 Fed. Reg. 31,452 (June 7, 2007) (“Order No. 693”), *aff’d*, Order No. 693-A, 72 Fed. Reg. 40,717 (July 25, 2007), 120 F.E.R.C. ¶ 61,053 (2007) (“Order No. 693-A”).

3. Whether, to the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose a reliability standard or modify a reliability standard consistent with FERC’s specific directives as to the technical content of such standard, the ROP Order constitutes an arbitrary and capricious unexplained departure from the Commission’s own precedent. Order No. 672, Order No. 672-A, Order No. 693, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Airmark Corp. v. FAA*, 758 F.2d 685, 692 n.25 (D.C. Cir. 1985) (“[W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.”) (quoting *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)); *Panhandle E. Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for “the reasons for its departure”).

C. Specification of Errors Required by 18 C.F.R. § 385.713(c)(1)

1. To the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC’s specific directives as to the technical content of such standard, the Commission erred in directing a change that is contrary to the plain language and intent of Section 215 of the FPA. These issues include but are not limited to:
 - a) To the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC’s specific directives as to the technical content of such

standard, the Commission erred in directing a change that is contrary to the plain language and intent of Section 215 of the FPA, under which reliability standards are drafted by the ERO and approved or remanded by FERC;

- b) To the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission erred in directing a change that is contrary to the plain language and intent of Section 215 of the FPA, which directs FERC to give due weight to the technical expertise of the ERO;
 - c) To the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission erred in directing a change that is contrary to the plain language and intent of Section 215 of the FPA, which recognizes that NERC must be able to function as an international standards-setting organization;
 - d) To the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission erred in directing a change that is contrary to the plain language and intent of Section 215 of the FPA, which requires that the ERO—not FERC—must “provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties” (FPA § 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D));
2. To the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose or modify a reliability standard consistent with FERC's specific directives as to the technical content of such standard, the Commission erred in directing a change that is contrary to law and the Order should therefore be revised appropriately on rehearing.
 3. To the extent the Commission directed NERC to modify its Rules of Procedure to ensure that NERC is able to propose a reliability standard or modify a reliability standard

consistent with FERC's specific directives as to the technical content of such standard, the Commission erred in departing from its own precedent without explanation.

D. *Background: The Establishment of an Expert Reliability Standard-Setting Body that Can Achieve Consensus and Operate on an International Basis*

Following major Western system power outages in the summer of 1996, the Secretary of Energy formed The Secretary of Energy Advisory Board's Task Force on Electric System Reliability ("DOE Task Force") to "advise on critical institutional, technical, and policy issues that need to be addressed in order to maintain bulk electric system reliability in the context of a more competitive industry."¹¹ The DOE Task Force issued its Final Report on September 29, 1998, recommending the passage of legislation allowing for the establishment of mandatory and enforceable reliability standards. As the Commission noted in the Order No. 672 NOPR¹² (P 4) the DOE Task Force recommended that the reliability standards be developed by a self-regulatory reliability organization ("SRRO"). Importantly, the DOE Task Force recommended that FERC have no authority to directly modify such standards, as explained in the following passage of its Final Report:

The FERC would have regulatory oversight to ensure compliance with and ultimately resolve disputes over any SRRO mandatory reliability standards. The SRRO would produce mandatory standards applicable to all participants in the domestic and international bulk-power system. The FERC would either confirm SRRO mandatory standards or deny them and refer them back to the SRRO with

¹¹ U.S. Dep't of Energy, Maintaining Reliability in a Competitive U.S. Electricity Industry : Final Report of the Task Force on Electric System Reliability, at ix (Sept. 29, 1998), available at <http://www.nerc.com/docs/docs/pubs/esrfinal.pdf> ("Final Report").

¹² Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, 70 Fed. Reg. 53,117 (proposed Sept. 7, 2005), [2004-2007 Proposed Regs.] F.E.R.C. Stat. & Regs. ¶ 32,587 (Sept. 1, 2005).

comments requesting revision and resubmittal of the standards.

Final Report at 67.

The grant of standard development authority to NERC, rather than FERC, was recognized as vital not only because of NERC's and the industry's expertise, but also because of the international nature of the grid. The DOE Task Force recommended that standards be set by an SRRO, in part, because “[t]ransmission grid reliability is a North American issue; the reliability relationships with Canada and Mexico must be preserved.”

Id. at 61. The DOE Task Force further explained:

In recognition of the international nature of the interconnected transmission grid, the Task Force has taken the position that mandatory electric reliability standards must be developed by the SRRO and approved by the FERC in accordance with the Administrative Procedures Act. Standard development needs to be done by a single entity that can represent all countries using the interconnected transmission grid. Also, SRRO development of the mandatory standards would avoid the imposition of federally developed standards on those portions of the interconnected transmission grid located in Canada and Mexico. Currently, the Canadian government and electric industry is represented in NERC and it will be necessary to include both Canadian and Mexican representation in the SRRO. The interests of the United States would be protected by enabling the FERC to require the SRRO to develop or modify standards as necessary. It would be incumbent upon the SRRO to develop mandatory standards that are acceptable to all three countries.

Id. at 68.

Recognizing the importance of establishing a process that is respectful of jurisdictional sovereignty of all relevant governmental authorities, the Clinton Administration had proposed reliability legislation based on the DOE Task Force recommendations as part of the Comprehensive Electricity Competition Act (H.R. 1828,

106th Cong. (1999)). As then-Secretary Bill Richardson explained in testimony before the House Energy and Power Subcommittee, “FERC would be given the authority to approve and oversee an organization that will prescribe and enforce mandatory electric reliability standards. FERC would review all mandatory reliability standards developed by the organization to ensure that they are in the public interest and reflect an appropriate level of reliability.” *Electric Restructuring Legislation: Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Commerce*, 106th Cong. 19 (1999) (statement of Bill Richardson, Secretary, U.S. Department of Energy).

The distribution of authority between the Commission and NERC was very clearly addressed in the drafting and Senate floor debate regarding the reliability provision ultimately included in the Energy Policy Act of 2005. In 2002, the version of S. 517 marked out of the Senate Energy and Natural Resources Committee (sometimes referred to as the “Daschle Bill”) would have granted the Commission direct authority to regulate reliability; Senator Bingaman (D-NM), then the Chair of the Energy and Natural Resources Committee, strongly supported that approach on the floor of the Senate. He explained, “[w]e give FERC the responsibility. We provide tremendous flexibility for FERC to defer to experts, to defer to regional entities, to defer to private groups to implement the obligation. But when push comes to shove, FERC has the responsibility . . .”¹³

On the other side, Senator Thomas (R-WY), also a member of the Energy and Natural Resources Committee, supported an amendment to S. 517 that inserted the language that was ultimately codified as FPA § 215. Senator Thomas explained that

¹³ 148 Cong. Rec. 3218 (2002).

whereas the then-current version of S. 517 “gives all the authority and responsibility to FERC . FERC is to set the standards, FERC is to enforce the standards[.] . . . [t]he amendment, instead, establishes a participant-run, FERC-overseen electric reliability organization. This is key to this whole amendment and this whole direction. It is a blend of Federal oversight along with industry expertise.”¹⁴ He further stated that “[u]nder this amendment, the new reliability organization will be run by market participants and will be overseen by FERC.”¹⁵

Senator Thomas (*id.* at 3217-18) had good reasons for giving NERC the authority to draft standards:

This is very technical work that will require a very large commitment of resources.

Unfortunately, FERC does not have either the technical capability or the manpower to take on such a significant new responsibility. FERC’s expertise is ratemaking, not in technical standard setting.

Another key problem with [S. 517] is that it does not recognize regional differences in electrical systems due to the geography, the market design, the economics, and the operational factors. Many fear that FERC does not have the sensitivity to the regional differences that are so critically important

....

Regional differences are best taken into account by those who are closest to the problem and those who understand what needs to be done, and that, unfortunately, is not FERC.

¹⁴ *Id.* at 3217.

¹⁵ *Id.*

In addition, [S. 517] simply does not address adequately the needs of the States for a meaningful role in the process of setting and enforcing reliability standards....

Under [S. 517], the States, as any other interested or affected party, can make their views known to FERC as part of any formal rulemaking, but FERC can disregard those State views, substituting FERC's judgment for that of the States. . . .

....

This amendment addresses all of those concerns. In a nutshell, the amendment converts the existing NERC voluntary reliability system into a mandatory reliability system.

Senator Thomas noted the importance of an independent standard-setting body from the perspective of the international grid, as explained in the following passage from the debate:

[S. 517] also fails to account for the international nature of our transmission grid. Canada is already part of a seamless North American grid, and Mexico is also an interconnect.

If reliability is given to FERC, as in [S. 517], FERC will be trying to set standards applicable to and affecting transmission in Canada and Mexico, over which FERC has no authority. I fear Canada and Mexico simply will not allow their systems to be regulated directly or indirectly by FERC. After all, of course, they are sovereign nations.

If these two nations withdraw from collaborative efforts, not only will it jeopardize the reliability of the entire North American grid, it will certainly also seriously impair cross-border trade in electricity.

Continued international trade is critical to our supply of power. As we have seen in California, even a minor shortfall of electricity can create significant problems in terms of price spikes and blackouts. In short, we need to have that Canadian component. And they are a voluntary part of this system.

Id. Recognizing that the S. 517 approach could have “a negative impact on Canada-U.S. electricity trade,” then-Senator Smith (R-OR) also supported the Thomas language. *Id.* at 3222. The approach contained in the Thomas language was ultimately approved by Congress in the Energy Policy Act of 2005.

Senator Thomas summed up the choice between the language in S. 517 supported by Senator Bingaman and the language in the amendment he supported by suggesting that “[i]f you want more Federal command and control by the FERC . . . then vote against this amendment. But if you want a realistic and effective reliability program . . . then we need to vote for this amendment.”¹⁶

Shortly after this discussion, the amendment passed on voice vote, giving us the provision under which the industry and the Commission are now operating.

While the votes for and against the amendment were not recorded, the votes to set aside a procedural objection raised by Senator Bingaman were recorded. That motion passed by a strong vote of 60-40.¹⁷ Section 215 of the FPA, as enacted in the Energy Policy Act of 2005, is substantially identical to the reliability language in S. 517 as modified by Senator Thomas’s amendment.

Congress recognized NERC’s, the industry’s, the States’, and foreign jurisdictions’ experience and technical expertise in drafting reliability standards and assigned them that responsibility. Congress recognized that the process established by Section 215 was “complex” and that it could be “cumbersome.”¹⁸ But, it was Congress’ call, and Congress directed FERC to defer to the ERO’s technical expertise, as informed

¹⁶ *Id.* at 3218.

¹⁷ *Id.* at 3241-42.

¹⁸ *Id.* at 3219.

through a standards development process reflecting public comments, due process, openness and balance of interests; directed FERC to remand—not rewrite—proposed standards with which it disagreed; and directed FERC to order NERC to propose standards or modified standards that “address[]” specific matters raised by the Commission,¹⁹ not to draft its own standards.

In first approving the rules concerning the certification of the ERO and the procedures for the establishment, approval, and enforcement of electric reliability standards in Order No. 672, FERC recognized its statutory obligation to give due weight to the ERO’s technical expertise. Order No. 672, P 344. Indeed, the Commission emphasized that “it is not our intent to prescribe the text or substance of a Reliability Standard.” Order No. 672-A, P 34. FERC also recognized the importance of a structure that allows the ERO to operate on an international basis. In that order, FERC recognized that “for the ERO to be effective in maintaining Bulk-Power System reliability across national borders, it must be able to operate in an international arena.” Order No. 672, P 126.

Following the establishment of the ERO, FERC approved the first 83 proposed Reliability Standards in Order No. 693. In that order, while approving the standards, FERC directed NERC to make modifications to a number of the standards. In response to comments that FERC’s proposed modifications were too prescriptive, FERC stated that it “agrees that a direction for modification should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO’s Reliability Standards development process.... [I]t is important that the Commission provide sufficient

¹⁹ FPA § 215(d)(5), 16 U.S.C. § 824o(d)(5).

guidance so that the ERO has an understanding of the Commission's concerns and an appropriate, but not necessarily exclusive, outcome to address those concerns." Order No. 693, P 185 (emphasis added). FERC emphasized that it was not mandating a specific change to a Reliability Standard through its directive for modification, as explained below:

Consistent with Section 215 of the FPA and our regulations, any modification to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through NERC's Reliability Standard development process. The Commission's directives are not intended to usurp or supplant the Reliability Standard development procedure. Further, this allows the ERO to take into consideration the international nature of Reliability Standards and incorporate any modifications requested by our counterparts in Canada and Mexico.

Id. P 187. Importantly, it was in Order No. 693 that FERC directed the modification to FAC-008 that is now at issue. Contrary to Order No. 693, FERC now appears to be attempting to prescribe an exclusive outcome of NERC's standards development process.

In these initial orders approving NERC and the first of the Reliability Standards, FERC recognized the importance of a standard-setting process that allows NERC to draw on the expertise of and consider the concerns of U.S., Canadian, and Mexican entities. Such recognition was consistent with the intent of the approach under Section 215, which was designed to allow NERC, as an existing organization with expertise in reliability, to continue to set reliability standards and to operate effectively on an international basis, drawing on industry expertise through an open standards development process reflecting a balance of interests.

E. A Directive to NERC to Modify its Rules of Procedure to Ensure that NERC Proposes or Modifies a Reliability Standard Consistent with FERC's Guidance as to the Technical Content of a Standard Would Violate the Language and Intent of Section 215

FERC is directing NERC to modify its Rules of Procedure to allow NERC “to comply with a Commission directive pursuant to section 215(d)(5) of the FPA.” ROP Order P 3. FERC maintains that a standards drafting team could “develop a new or modified draft Reliability Standard that is not responsive to a Commission directive to draft a new or modified Standard, and the ballot body can approve the non-responsive Standard.” *Id.* P 4. “[O]nce a Commission directive is final, the participants in NERC’s Standards Development Process do not have the discretion to simply ignore the directive or develop provisions to a new or revised Reliability Standard that clearly contradicts the plain understanding of the Commission directive.”²⁰ *Id.* P 23. The ROP Order directs modifications to NERC’s Standards Development Process “[t]o resolve the conflict between the Standards Development Process and the ERO’s statutory obligation to comply with Commission directives to develop or modify a particular Reliability Standard.” *Id.* P 5.

Under Section 215 of the FPA, FERC can approve a proposed Reliability Standard or can reject and remand a Reliability Standard, but it cannot develop a Reliability Standard; only the ERO has such authority. Section 215(d)(5) of the FPA provides that “[t]he Commission, upon its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the

²⁰ In the case of FAC-008, the Commission’s directive was not ignored. See n.10 above.

Commission considers such a new or modified reliability standard appropriate to carry out this section.” NERC in turn is required to develop standards through a process that “provide[s] for reasonable notice and opportunity for public comment, due process, openness, and balance of interests.” FPA § 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D). The statute does not permit FERC to dictate exactly how NERC is to address that specific matter, exactly what the proposed standard should do, or exactly how the proposed standard should read.

FERC cannot exercise its authority under Section 215(d)(5) to do what it has no authority to do under Section 215 as a whole – develop a specific Reliability Standard. To the extent that FERC is directing that the NERC Rules of Procedure be modified to ensure that NERC modifies a particular Reliability Standard consistent with a FERC directive as to the technical content of a standard, FERC is essentially attempting to do indirectly what it has no authority to do under Section 215 and what it has said it would not do in Order Nos. 672 and 693 – mandate that a Reliability Standard be changed in a specific way and that such standard be submitted to FERC for approval.

Moreover, if the ROP Order is intended to require more than that NERC be able to submit a standard that addresses a specific matter identified by the Commission, the ROP Order violates Section 215(d)(2), which states that “[t]he Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard.” FERC cannot possibly give “due weight” to NERC’s expertise if NERC is not permitted to deviate (with a detailed technical explanation supporting such a deviation) from FERC’s recommendations as to the content of a standard. A directive to NERC specifying the technical content of a standard

would also negate the statute's directive that standards must be developed by the ERO through a process that "provide[s] for reasonable notice and opportunity for public comment, due process, openness, and balance of interests." FPA § 215(c)(2)(D). To the extent the ROP Order is in conflict with the language and intent of Section 215, it is contrary to law and must be revised on rehearing. 5 U.S.C. §§ 706(2)(A), (C), (D).

Prescribing the substantive contents for a modification to a Reliability Standard and then essentially directing that such modification be implemented would also undermine NERC's ability to operate effectively as an international ERO. Such directives would limit the ability of Canadian entities to participate in the standards development process. Further, such directives would undermine the ability of FERC and Canadian governmental authorities to coordinate in the development and approval of Reliability Standards, and in the resolution of any issues arising during the standards modification process. Modification of the NERC Rules of Procedure in response to the ROP Order could easily lead to the approval, in the future, of conflicting requirements by differing governmental authorities. Or stated otherwise, it could lead to one set of standards in the United States, and a different set of standards in Canada.

As discussed in Section II.D above, the meaning and intent of Section 215 are clear, both on the face of the provision and in the context of the rest of the FPA and Section 215's legislative history.²¹ "[T]hat is the end of the matter." *United States v.*

²¹ The legislative history of a provision is relevant to a court's review of FERC's application of that provision, even where FERC's interpretation is accorded *Chevron* deference. *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1075, 1077 (D.C. Cir. 2008); *NRDC v. Abraham*, 355 F.3d 179, 198 (2d Cir. 2004). In *First Iowa Hydro-Elec. Co-op. v. FPC*, the fact that state consent to licensing had been proposed in the course of legislative debate but was never enacted was a significant indication to the Supreme Court that Congress had considered but rejected a reservation of this right to the states. 328 U.S. 152, 179 (1946) ("The proviso was not enacted into law, but it illustrates the concreteness with which the proposal was before Congress."). FERC itself should therefore consider the legislative history of Section 215 in this

Haggar Apparel Co., 526 U.S. 380, 392 (1999) (quoting *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984)). Congress decided that the ERO, not FERC, should be charged with drafting reliability standards, and that FERC's review of reliability standards must give due weight to the ERO's expertise. To the extent that the ROP Order requires NERC to develop procedures allowing NERC to comply with FERC directives as to the technical content of a standard, the ROP Order is thus contrary to law.

If Section 215 were ambiguous, which it is not, FERC's interpretation of it would be entitled to deference only if it is reasonable. *Chevron*, 467 U.S. at 842 - 43 (1984). To be considered reasonable, an interpretation must be permissible in light of the statutory text and legislative history. *See Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 94 (D.C Cir. 2001). The purpose of the statute must also be considered in determining the reasonableness of an interpretation. *Associated Gas Distrib. v. FERC*, 899 F.2d 1250, 1263 (D.C. Cir. 1990). It is a ““fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). As discussed above, to the extent that FERC interprets Section 215(d) as permitting it effectively to dictate the technical content of a reliability standard, that interpretation is unreasonable.

If the Commission departs from its precedent, it must acknowledge the departure and explain it. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.

1970).²² As discussed in Section II.D above, the Commission recognized in Order No. 672 and Order No. 693 that its authority with respect to reliability standards was limited to approving or remanding a standard, or directing NERC to submit a standard addressing a specific matter, and that it should not dictate the content of a standard. To the extent the ROP Order now directs NERC to modify the ROP so that FERC can dictate the technical content of a standard, the ROP Order is an unacknowledged, unexplained, and therefore unlawful departure from the Commission’s precedent.

F. FERC Should Reverse its Order to the Extent that the Order Requires NERC to Modify its Rules of Procedure to Require that New or Modified Reliability Standards Must Comply with Specific FERC Directives as to the Content of the Standard

As explained above, the Trade Associations are concerned that modifications to the NERC Rules of Procedure to ensure that FERC directives are implemented would interfere with NERC’s standard-setting process and would therefore impede NERC’s ability to operate effectively as an international standard-setting organization. The Trade Associations recognize that FERC has the authority under Section 215(d)(5) to direct that NERC “address[] a specific matter” and can expect that NERC would submit a standard or modification to a standard for FERC consideration based on such an order. And the Trade Associations recognize that FERC will, in reviewing a proposed standard, identify the issues it has with a particular standard. The DOE Task Force understood that FERC would need to provide NERC “with comments requesting revision and resubmittal of the

²² See also *Airmark Corp. v. FAA*, 758 F.2d 685, 692 n.25 (D.C. Cir. 1985) (“[W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.”) (quoting *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)); *Panhandle E. Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for “the reasons for its departure”).

standards.” Final Report at 67. But what the Trade Associations object to, and what we believe is wholly inconsistent with the language and intent of Section 215 of the FPA, is FERC’s apparent attempt to ensure that the specific and detailed technical modifications it has directed regarding the substance of a particular Reliability Standard are implemented in whole by NERC.

FERC can direct NERC to address a specific matter and FERC can direct that NERC submit a standard to FERC in response to that directive. What FERC cannot and should not do is issue directives that essentially tie NERC’s hands in how that standard should be drafted or modified. Under Section 215, FERC was specifically provided no authority to develop a reliability standard. The Order at issue cannot enable FERC to do what it was specifically denied authority to do under Section 215. Accordingly, pursuant to Section 215 and the commitment FERC has made to respecting the international nature of the NERC standard-setting process, the Trade Associations request that the Commission, through clarification or rehearing, confine its Order to requiring NERC only to modify its Rules of Procedure to ensure that NERC has the ability to submit a new or modified standard in response to a FERC directive to address a specific matter.

CONCLUSION

For the reasons stated above, the Trade Associations request that the Commission grant their motions to intervene. At a minimum, the Commission should clarify that NERC needs only to modify its Rules of Procedure to ensure that, when FERC directs NERC to address a specific matter, NERC has the ability to submit a new or modified standard. In the alternative, to the extent that the Order requires that NERC be able to modify a reliability standard or propose a new standard consistent with FERC’s specific

directives as to the technical content of such standard, the Commission should grant rehearing and reverse its Order.

Respectfully submitted,

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April 19, 2010

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 19th day of April, 2010

/s/ Rebecca J. Baldwin

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