UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure	Docket Nos. RM12-6-000 RM12-7-000

REQUEST FOR REHEARING AND CLARIFICATION OF TRANSMISSION ACCESS POLICY STUDY GROUP AND ELECTRICITY CONSUMERS RESOURCE COUNCIL

Pursuant to Federal Power Act Section 313, 16 U.S.C. § 825*l*, and 18 C.F.R. § 385.713, the Transmission Access Policy Study Group ("TAPS") and Electricity Consumers Resource Council ("ELCON") ask the Commission to rehear and clarify Order No. 773, the Commission's December 20, 2012 Final Rule accepting the definition of Bulk Electric System ("BES") and related Rules of Procedure of the North American Electric Reliability Corporation ("NERC").[1] While TAPS and ELCON applaud the Commission's decision to accept many aspects of the BES definition, we seek rehearing of the Final Rule's determinations that change Exclusions E1 and E3 without following the procedure set out in Section 215 of the Federal Power Act ("FPA"), and fail to give due weight to NERC's technical expertise. In addition, we request that the Commission revise or clarify its intended procedures for making local distribution determinations.

[1] Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure, Order No. 773, 78 Fed. Reg. 804 (Jan. 4, 2013), 141 FERC ¶ 61,236 (2012) ("Final Rule").

I. STATEMENT OF ISSUES

1. Whether the Final Rule exceeds the Commission's authority by effectively rewriting the BES definition when it directed NERC to implement the definition in a way that would make two radial systems connected by a low-voltage loop ineligible for Exclusion E1, contrary to its terms, the BES definition's structure, and NERC's interpretation of its own definition, and failed to follow the statutory process for directing development of modified standards. FPA § 215(d)(5), 16 U.S.C. 824o(d)(5); 5 U.S.C. § 706(2)(C), (D); Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, 72 Fed. Reg. 16,416 (Apr. 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2007), *effective date stayed*, 72 Fed. Reg. 31,452 (June 7, 2007), *aff'd*, Order No. 693-A, 72 Fed. Reg. 40,717 (July 25, 2007), 120 FERC ¶ 61,053 (2007).
2. Whether the Final Rule fails to give due weight to the technical expertise of the Electric Reliability Organization by directing NERC to implement the BES definition in a way that would make two radial systems connected by a low-voltage loop ineligible for Exclusion E1, contrary to its terms, the BES definition's structure, and NERC's interpretation of its own definition. FPA § 215(d)(2), 16 U.S.C. 824o(d)(2); 5 U.S.C. § 706(2)(C), (D).
3. Whether the Final Rule's directive to modify Exclusion E3 to remove the 100 kV minimum operating voltage is arbitrary and contrary to the requirements of Section 215 of the Federal Power Act. FPA § 215(d)(5); 5 U.S.C. § 706(2)(A), (C), (D); Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, FERC Stats. & Regs. ¶ 31,242 (2007).
4. Whether the Final Rule exceeds the Commission's authority by effectively rewriting the BES definition when it directed NERC to implement the definition in a way that would make systems with less than 75 MVA of BES generation ineligible for Exclusions E1 and E3, contrary to its terms and NERC's interpretation of its own definition, and failed to follow the statutory process for directing development of modified standards. FPA § 215(d)(5); 5 U.S.C. § 706(2)(C), (D); Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, FERC Stats. & Regs. ¶ 31,242 (2007); Revision to Electric Reliability Organization Definition of Bulk Electric System, Order No. 743, 133 FERC ¶ 61,150 (2010).
5. Whether the Final Rule fails to give due weight to the technical expertise of the Electric Reliability Organization by directing NERC to implement the BES definition in a way that would make systems with less than 75 MVA of BES generation ineligible for Exclusions E1 and E3, contrary to the Exclusions' terms and NERC's interpretation of the Exclusions. FPA § 215(d)(2); 5 U.S.C. § 706(2)(C), (D).
6. Whether the Final Rule is arbitrary and capricious because it requires the Commission to make local distribution determinations independently of the NERC exception process, which will result in redundancy, confusion, potentially conflicting determinations, and a waste of resources. 5 U.S.C. § 706(2)(A).

II. LIST OF ERRORS

1. The Final Rule exceeds the Commission's authority by effectively rewriting the BES definition when it directed NERC to implement the definition in a way that would make two radial systems connected by a low-voltage loop ineligible for Exclusion E1, contrary to its terms, the BES definition's structure, and NERC's interpretation of its own definition, and failed to follow the statutory process for directing development of modified standards.
2. The Final Rule fails to give due weight to the technical expertise of the Electric Reliability Organization by directing NERC to implement the BES definition in a way that would make two radial systems connected by a low-voltage loop ineligible for Exclusion E1, contrary to its terms, the BES definition's structure, and NERC's interpretation of its own definition.
3. The Final Rule's directive to modify Exclusion E3 to remove the 100 kV minimum operating voltage is arbitrary and contrary to the requirements of Section 215 of the Federal Power Act.
4. The Final Rule exceeds the Commission's authority by effectively rewriting the BES definition when it directed NERC to implement the definition in a way that would make systems with less than 75 MVA of BES generation ineligible for Exclusions E1 and E3, contrary to its terms and NERC's interpretation of its own definition, and failed to follow the statutory process for directing development of modified standards.
5. The Final Rule fails to give due weight to the technical expertise of the Electric Reliability Organization by directing NERC to implement the BES definition in a way that would make systems with less than 75 MVA of BES generation ineligible for Exclusions E1 and E3, contrary to the Exclusions' terms and NERC's interpretation of the Exclusions.
6. The Final Rule is arbitrary and capricious because it requires the Commission to make local distribution determinations independently of the NERC exception process, which will result in redundancy, confusion, potentially conflicting determinations, and a waste of resources.

III. ARGUMENT

A. Introduction

As the Commission has recognized,[2] the BES definition is the result of a great deal of hard work by NERC, power system experts, and stakeholders. Through its stakeholder process, the Electric Reliability Organization ("ERO") developed a reasonable definition whose parts are all interrelated and meant to work as a coherent

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[2] Final Rule P 3.

whole. The process involved balancing concerns: the goal was not for the core definition, inclusions, and exclusions to cover all elements that should ultimately be part of the BES, which would result in an over-broad definition, necessitating significant NERC, Regional, and registered entity resources to deal with exclusion exception requests. Nor was the goal to make the definition granular enough to account for every possible configuration, which would result in something too unclear to be useful. Instead, the ERO appropriately developed a set of clear principles that can be applied consistently to get the overall contours of the BES right. The exception process, not the core definition, inclusions, and exclusions, is intended to deal with the unusual cases on the margins.

The ERO made a considered determination about how the overall contours of the BES should be defined to protect reliability efficiently and effectively. NERC made the assessment of where to draw the lines among the various exclusions, and between the exclusions and the case-by-case exceptions process. NERC's assessment, based on its technical expertise, took account of the burdens on registered entities of developing the technical justifications required to support an exception and the administrative burden on all involved in evaluating that justification. In addition, by capturing the most likely outcomes under exclusions, and limiting exceptions to the more unusual situations, NERC's proposed delineation of the various exclusions took into account the heavy burden placed on registered entities of complying with NERC standards while the NERC exception process is pending. The filed definition reflects NERC's determination of the right balance, recognizing that at the end of the day, the exception process is intended to provide a mechanism for inclusion of all elements that should be part of the BES where

the general rule reflected in the core definition and inclusions/exclusions does not fully capture the impact of a particular configuration.

The Final Rule, by interpretation and modification of the E1 and E3 exclusions, dramatically altered that balance, with the result that many more registered entities will be subject to the more costly efforts to justify an E3 exclusion. Worse yet, the Final Rule will sweep many more registered entities into the time-consuming and expensive exceptions process, while being subject to full compliance with the applicable reliability standards (which could well mean the hundreds of TO/TOP requirements) during the exceptions process.

The Commission has overstepped its Section 215 authority by interpreting NERC's BES definition contrary to its terms and NERC's own interpretation, thereby redrafting NERC's definition. Section 215 allows the Commission to remand a standard to NERC or direct NERC to submit a standard that addresses a specific matter;[3] but it does not allow the Commission to write its own standards. Moreover, Section 215 requires the Commission to defer to NERC on the technical content of reliability standards.[4] Therefore, the Commission should not second guess NERC's judgment, and substitute its own views on the technical content of standards in place of NERC's. Even assuming the directives were appropriate and supportable, the Commission should limit

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[3] In such case, NERC would have the ability to propose an alternative that is "as effective as, or superior to, the Commission's proposed approach in addressing the Commission's technical and other concerns." Revision to Electric Reliability Organization Definition of Bulk Electric System, Order No. 743, 75 Fed. Reg. 72,910 (Nov. 26, 2010), 133 FERC ¶ 61,150, P 16 (2010), *on reh'g*, Order No. 743-A, 76 Fed. Reg. 16,263 (Mar. 23, 2011), 134 FERC ¶ 61,210 (2011).

[4] FPA § 215(d)(2), 16 U.S.C. 824o(d)(2).

itself to the tools Congress allowed it (i.e., directing development of modified standards to address specific matters).

On rehearing, the Commission should accept the BES definition as filed, without implementation directions and other directives. If the Commission has concerns about the definition as filed, it should follow the approach it adopted with respect to the 300 kV ceiling in Exclusion E3:[5] direct NERC to implement the definition as written and make an informational filing one year following the end of the implementation period.

TAPS and ELCON do not oppose the Commission's decision to make local distribution determinations itself. We do, however, request rehearing of the decision in the Final Rule to place those determinations on a separate track from the NERC exceptions process, because doing so will result in duplicative efforts, wasted resources, and procedural confusion.

B. The Commission Should Rehear its Disqualification of Configurations with Sub-100 kV Loops from Exclusion E1 and its Associated Modification of Exclusion E3.

1. The Final Rule's interpretation of E1 to disqualify radials connected by sub-100 kV loops amounts to an impermissible change in NERC's BES definition.

Exclusion E1 applies to "[a] group of contiguous transmission Elements that emanates from a single point of connection of 100 kV or higher" that meet certain criteria. Final Rule P 127. The NOPR asked whether a configuration consisting of two radial lines above 100 kV connected by a sub-100 kV line ("Figure 3") qualified for Exclusion E1.[6] Commenters, including NERC, as well as TAPS, responded that Figure 3

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[5] Final Rule P 206.

[6] Notice of Proposed Rulemaking, 139 FERC ¶ 61,247, P 81 (2012) ("NOPR").

depicts two radial systems, each of which qualifies for Exclusion E1. As NERC explained:[7]

> The BES Definition must be applied in a three step process. First, the BES Definition is used to establish the bright-line of 100 kV, which is the overall demarcation point between BES and non-BES Elements. Step 2 identifies specific Elements that are included. Step 3 evaluates specific circumstances to identify whether Elements should be excluded from the BES.

The Final Rule, however, finds that two radial lines above 100 kV connected by a sub-100 kV line are not eligible for Exclusion E1, and that their portions above 100 kV are thus considered BES unless they qualify for Exclusion E3 or are removed through the case-by-case exception process. Final Rule P 155. The Commission also ordered modification of Exclusion E3 to remove that exclusion's 100 kV floor to accommodate consideration of configurations with sub-100 kV loops in Exclusion E3. Final Rule PP 155, 199.

The Commission lacks authority to redraft standards, and thereby change the obligations imposed by a standard.[8] Nevertheless, the Final Rule does so; by reinterpreting the exclusion contrary to its language and NERC's interpretation, the Final Rule revises the BES definition, substantially changing the compliance obligations of registered entities. As a result, the Commission is essentially attempting to do indirectly

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[7] Comments of NERC in Response to NOPR at 18 (Sept. 4, 2012), eLibrary No. 20120904-5231 ("NERC Comments"); *see also* Petition of NERC for Approval of a Revised Definition of Bulk Electric System in the NERC Glossary of Terms Used in Reliability Standards at 54-55, Docket No. RM12-6 (Jan. 25, 2012), eLibrary No. 20120125-5142 ("NERC Petition for Approval").

[8] The BES definition is a "Reliability Standard" for purposes of Section 215 review, as the Commission has recognized. *See, e.g.*, Order No. 743, P 29.

what it has no authority to do under Section 215—rewrite a reliability standard.[9] (As discussed below, to make matters worse, it does so without following or acknowledging the process set out in Section 215 or giving due weight to the technical expertise of the ERO.)

The Final Rule's interpretation of Exclusion E1 as unavailable to radials above 100 kV connected through lower voltage facilities (i.e., the Figure 3 configurations) is contrary to the plain language of the exclusion, the BES definition as a whole, and NERC's interpretation of the exclusion. The Final Rule's finding that Exclusion E1 is inapplicable to such a configuration, on the basis that the configuration is "networked" and is not a "radial system" (Final Rule P 155), is unreasonable and constitutes an impermissible *sub rosa* change to the definition filed by the ERO.

As NERC explained in its comments, elements that are not included in the BES under the core definition are not considered in determining the applicability of the exclusions. NERC Comments at 18. Because the core definition is limited to transmission elements 100 kV and above, a sub-100 kV loop is not considered in applying the exclusion and therefore does not render two otherwise eligible radial systems ineligible for Exclusion E1. Exclusion E1 applies to "[a] group of contiguous transmission Elements that emanates from a single point of connection of 100 kV or higher" meeting certain criteria, plainly referring to a group of transmission elements that are contiguous above 100 kV. Final Rule P 127.

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[9] 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).

The structure of the BES definition demonstrates that the Final Rule's interpretation is tantamount to rewriting the standard. As the Commission acknowledges (Final Rule P 155), Exclusion E3 would have to be revised to avoid an illogical result under the Final Rule's interpretation of Exclusion E1. Under the Final Rule's interpretation, two radials connected by a sub-100 kV loop would be ineligible for Exclusion E1. Such a configuration is also ineligible for Exclusion E3 as written because the loop is less than 100 kV. If radial systems connected by a sub-100 kV loop had *not* been intended to be eligible for Exclusion E1, then Exclusion E3 would have been drafted to allow such configurations to be covered. The fact that Exclusion E1 as interpreted by NERC to encompass radial 100 kV lines connected below 100 kV works perfectly with Exclusion E3's limitation to facilities 100 kV and above reinforces the conclusion that the Final Rule's interpretation of Exclusion E1 is inconsistent with the language and structure of the BES definition and amounts to impermissible redrafting of a NERC reliability standard.

The unreasonableness of the Final Rule's reading of Exclusion E1 is also demonstrated by NERC's contrary interpretation of its proposed BES definition. *See, e.g.*, NERC Comments at 18-19. Under the regime Congress established by Section 215, it is the ERO, not the Commission, that has the authority to draft reliability standards—i.e., the "regulations" that establish the reliability obligations of users, owners, and operators of the bulk-power system. In assessing whether the Commission is rewriting a standard under the guise of interpreting it, NERC's interpretation of its own standard

should be accorded significant weight, and should not be subordinated to the Commission's interpretation of NERC's proposed standards.[10]

In enacting Section 215, Congress explicitly recognized the experience and technical expertise in drafting reliability standards of NERC and its stakeholders, and assigned them that responsibility. Congress was aware that the process established by Section 215 was "complex" and that it could be "cumbersome."[11] But, it was Congress' call, and Congress directed the Commission to defer to the ERO's technical expertise, as informed through a standards development process reflecting public comments, due process, openness and balance of interests; directed the Commission to remand—not rewrite—proposed standards with which it disagreed; and directed the Commission to order NERC to propose a reliability standard or a modification to a reliability standard that "address[es]" specific matters raised by the Commission,[12] not to draft its own standards. As the Commission explained in Order No. 693, when the ERO proposes a reliability standard the Commission has only four permitted courses of action: "(1) [a]pprove; (2) approve as mandatory and enforceable; and direct modification pursuant to section 215(d)(5) [which allows the Commission to order the ERO to submit a standard that 'addresses a specific matter']; (3) request additional information; or (4) remand."[13]

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[10] *C.f. Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991) (stating that an agency's authority to interpret its own regulations stems from its authority to issue regulations).

[11] 148 Cong. Rec. 3219 (2002) (statement of Sen. Bingaman).

[12] FPA § 215(d)(5).

[13] Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, 72 Fed. Reg. 16,416 (Apr. 4, 2007), FERC Stats. & Regs. ¶ 31,242, P 184 (2007), *effective date stayed*, 72 Fed. Reg. 31,452 (June 7, 2007), *aff'd*, Order No. 693-A, 72 Fed. Reg. 40,717 (July 25, 2007), 120 FERC ¶ 61,053 (2007); *see also* legislative history of Section 215, 148 Cong. Rec. 3217-18, 3241 (2002) (statement of Sen. Thomas) (intent of the language that became Section 215 was to give the ERO, rather than FERC, authority to draft standards).

Changing a standard by interpreting it contrary to its terms is not an option available to the Commission under the Section 215 statutory scheme.

In short, the Final Rule's interpretation of Exclusion E1 contrary to its terms, the BES definition's structure, and NERC's own interpretation, rewrites the BES definition. Such use of interpretation to rewrite a standard is a fundamental departure from the Section 215 statutory scheme and should be reconsidered on rehearing.

2. The Final Rule improperly fails to give due weight to NERC's technical expertise.

The Final Rule's interpretation of Exclusion E1 as inapplicable to radials above 100 kV with sub-100 kV connections, and its consequent directive to modify Exclusion E3, improperly substituted the Commission's own judgment for NERC's. It therefore also 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."[14]

In response to NERC's explanation that networked connections operating below 100 kV generally do not carry significant parallel flow because of higher impedance characteristics, the Final Rule states that the Commission

> believes that excluding these configurations solely on the level of impedance does not consider other factors, including voltage, the system configuration, type of conductors, length of conductors, and proximity of the networked system in the interconnected transmission network.

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[14] *See also* 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), FERC Stats. & Regs. ¶ 31,204, P 344 (2006), *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006), *on reh'g*, Order No. 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212, P 34 (2006), *modified*, 73 Fed. Reg. 21,814 (Apr. 23, 2008), 123 FERC ¶ 61,046 (2008); Order No. 693, PP 185, 187.

Final Rule P 155 n.139. But the Final Rule's identification of other factors does not support redrafting Exclusion E1 and overriding NERC's technical judgment that sub-100 kV networked facilities do not generally affect the applicability of the exclusion. NERC does not argue (nor do we) that impedance is the only possible relevant factor in all cases. To the contrary, the BES exception process exists precisely to consider other factors such as those listed by the Commission that may be relevant in particular cases. As NERC explained, it is

> appropriate for the BES Definition to focus on looped or networked connections at 100 kV or greater because such connections, when operated below 100 kV, *generally* do not carry significant parallel flow because of the higher impedance associated with lower voltage facilities. In the event that such connections are found to be necessary for the reliable operation of the interconnected transmission network, the Rules of Procedure exception process may be utilized on a case-by-case basis to include the associated Element(s).

NERC Comments at 19 (emphasis added). The Final Rule's identification of other possible factors to be considered provides no support for second guessing the technical content of NERC's standard, which already allows for consideration of such factors in a targeted, efficient manner where they come into play—through the exception process.

Thus, the ERO made a determination that sub-100 kV loops *generally* do not impact the grid, but recognizes that those that do are more appropriately handled through the case-by-case exceptions process. For example, it would be absurd to subject all of the radials above 100 kV connected by 12.5 kV loops on Commonwealth Edison's system to the burdens of collecting historical data for purposes of the Exclusion E3 analysis, or

worse, to the heavier burdens of the NERC exception process.[15] Yet, that absurdity will result from the Final Rule's interpretation of Exclusion E1.

In contrast, NERC determined that the more appropriate route is to exclude such configurations through Exclusion E1 and capture outliers through the exception process. The drafting team and NERC recognized and addressed trade-offs in designing the core definition, inclusions and exclusions, and exception process. That is precisely the type of expert determination to which Section 215 tells the Commission to give due weight. The Final Rule's modification improperly changes that balance, and will result in a much heavier burden on all involved, with no benefit to reliability.

3. The Commission fails to follow the Section 215 process in changing Exclusion E1.

If, after giving due weight to the ERO, the Commission disagrees with the ERO's judgment, the Commission can remand a standard under Section 215(d)(4) or it can direct NERC to develop a standard to address a specific matter under Section 215(d)(5). *See* Part III.B.1 above; *see also* Order No. 693, P 187; *N. Am. Elec. Reliability Corp.*, 132 FERC ¶ 61,218, P 30 (2010). If the Commission directs NERC to address a specific matter, NERC would have the opportunity to use the stakeholder process to develop an alternative solution that is "as effective as, or superior to, the Commission's proposed approach in addressing the Commission's technical and other concerns." Order No. 743, P 16.

With respect to Exclusion E1, the Final Rule did not adopt either of those approaches. Instead, by reinterpreting Exclusion E1 contrary to its terms, the definition's

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[15] Comments of Exelon Corp. at 4-6 (Sept. 4, 2012), eLibrary No. 20120904-5286.

structure, and NERC's interpretation, the Commission arrogates the ERO's standard drafting authority to itself, and fails to follow the Section 215 process. Thus, even assuming the Commission were justified in second-guessing NERC's determination as to the technical content of its proposed standard, it fails to abide by the statutorily authorized process to direct development of a modified standard. In doing so, the Final Order fails to give NERC the opportunity to find an equally effective or superior solution to the Commission's concern.

4. The Final Rule's directive to modify Exclusion E3 is contrary to Section 215.

Because its incorrect reading of Exclusion E1 renders Exclusion E3 illogical, the Final Rule directs NERC (without reference to Section 215(d)(5)) to remove the 100 kV minimum from Exclusion E3. Final Rule PP 155, 199. As described above, the Commission should reverse its interpretation of Exclusion E1. It should also reverse its directive to NERC to modify Exclusion E3.

The Final Rule's only basis for revising Exclusion E3 is the Commission's incorrect interpretation of Exclusion E1. Final Rule PP 155, 199. The need to change Exclusion E3 arises only if Exclusion E1 is changed to foreclose exclusion of radials above 100 kV connected at lower voltages, resulting in the need for consideration of such configurations under Exclusion E3. In contrast, Exclusion E3 requires no change if Exclusion E1 is interpreted in accordance with its terms. Exclusion E3, as written, works perfectly with the rest of the BES definition when Exclusion E1 is construed in accordance with its terms, as NERC intended. If radials above 100 kV connected at lower voltages are excluded through Exclusion E1, sub-100 kV facilities do not need to be considered under Exclusion E3.

Because it rests solely on the Commission's improper interpretation of Exclusion E1, the Final Rule's modification to Exclusion E3 is arbitrary and contrary to the requirements of Section 215. Further, in directing this alteration of the BES definition, the Commission fails to give due weight to the technical expertise of the ERO.[16] *See* Part III.B.2 above. Further, even assuming a modification were justified, the directive to NERC to "modify exclusion E3 to remove the 100 kV minimum operating voltage in the local network definition" (Final Rule P 199) is more prescriptive than is permissible under the process set out in Section 215(d)(5), thereby improperly denying NERC the opportunity to develop an equally effective approach to address the Commission's concerns as discussed in Part III.B.3 above.

5. At most, the Commission should take no action beyond requiring an informational filing.

For all the reasons discussed above, TAPS and ELCON urge the Commission to rehear its determinations regarding treatment of sub-100 kV loops under Exclusions E1 and E3, and accept NERC's proposed BES definition without reinterpretation or directive. If the Commission nevertheless remains concerned that NERC's process is not adequately including radials of 100 kV or more connected by sub-100 kV loops, the Commission should at most adopt the procedure it used to address its concerns regarding Exclusion E3's 300 kV voltage threshold. In the Final Rule at P 206, the Commission held:

> The Commission approves the 300 kV voltage threshold for local networks for the initial implementation of the

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[16] *See* Exh. G of NERC Petition for Approval, Technical Justification for the "Local Network Exclusion" at 2 ("Exclusion E3 was specifically designed to capture for exclusion those *high voltage* non-radial facilities being used for the local distribution of energy.") (emphasis added).

> definition. While we approve the 300 kV threshold, the limited number of examples provided for 200-300 kV systems cause us to seek additional information. Thus, following implementation when actual exclusion data is available, the Commission directs NERC to submit a compliance filing within one year of the implementation date identifying in sufficient detail the types of local network configurations that have been excluded from the bulk electric system under this exclusion. This will assist us in better understanding the type and magnitude of systems that fall into above 200 kV category.

Application of this same approach to the treatment of sub-100 kV loops under Exclusion E1 would address the Commission's concerns, while also giving due weight to the ERO's expertise and remaining true to the Section 215 statutory scheme.

C. FERC Should Rehear its Directive that Systems with Less than 75 MVA of BES Generation be Ineligible for Exclusions E1 and E3.

Exclusions E1 and E3, by their terms, are applicable to systems with no more than 75 MVA of aggregate generation, if other conditions are met. The Final Rule, however, "direct[s] NERC to *implement* exclusion E1 so that the exclusions for radial systems do not apply to tie-lines for bulk electric system generators identified in inclusion I2." Final Rule P 164 (emphasis added). Similarly, with respect to Exclusion E3, the Final Rule states that "tie-lines for generators identified in the inclusion I2 should not qualify for exclusion as radial systems or local networks." Final Rule P 214; *see also* P 215, Figure labeled "Candidate Local Network Ineligible for Exclusion E3." The Final Rule's interpretation will prevent radial systems and local networks from qualifying for the E1 and E3 exclusions if they connect to BES generation between 20 MVA and 75 MVA.[17] The Commission explains its justification (Final Rule PP 164-65):

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[17] As relevant here, BES generation consists of those generating resources specified in Inclusion I2, "with

> If the generator is necessary for the operation of the interconnected transmission network, the Commission believes that it is generally appropriate to have the radial tie-line operating at or above 100 kV that delivers the generation to the bulk electric system included as well.
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> In general, we believe that it is appropriate to have the bulk electric system contiguous, without facilities or elements "stranded" or "cut-off" from the remainder of the bulk electric system as shown in the figure below. However, the contiguous quality of the bulk electric system is lost in exclusion E1, condition (b), because it removes from the bulk electric system the 100 kV or greater generator tie-line that connects the bulk electric system generator to the interconnected transmission network. Such tie-lines should be subject to appropriate Reliability Standards.

The Commission acknowledges that the Final Rule directs NERC to implement the BES definition contrary to its plain meaning. Final Rule P 167 ("We agree that exclusion E1 as written does not prevent the radial tie-line operating at or above 100 kV from the high side of the step-up transformer to the bulk electric system from being excluded while the generator and associated step-up transformer(s) remain included."). The Commission does not have the authority to do this. As set out in Part III.B above, the Commission lacks authority under Section 215 to rewrite a reliability standard itself. Nor may the Commission direct NERC to revise a standard except in accordance with the requirements set out in Section 215(d)(5). Directing NERC to implement the definition contrary to its terms is nothing more nor less than an impermissible redrafting of NERC's BES definition.

The Final Rule's action denying the availability of Exclusions E1 and E3 for transmission facilities because they connect to BES generation between 20 MVA and

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gross individual nameplate rating greater than 20 MVA or gross plant/facility aggregate nameplate rating greater than 75 MVA including the generator terminals through the high-side of the step-up transformer(s) connected at a voltage of 100 kV or above." Final Rule P 13.

75 MVA fails to give due deference to NERC's expertise in setting the right balance between the BES definition's exclusions and the BES exception process. The result of the Final Rule's directive will be to push many more facilities into the exception process, a resource-intensive endeavor for NERC, the Regions, and the affected entities. Not only will registered entities bear the burden of going through the exception process, but they will also bear the substantial, unnecessary cost of complying with reliability standards while NERC and the Regions evaluate each exception request. The compliance costs during this period will be significant, especially considering the hundreds of requirements applicable to Transmission Owners and Transmission Operators. NERC's BES definition, as written, reflects a technical judgment that radial systems and local networks with less than 75 MVA of BES generation generally do not have an impact on reliability that warrants subjecting all such systems to the exception process and its associated costs.[18] The Commission's directive impermissibly replaces that technical judgment with its own.

The Commission's concern, moreover, is already being addressed. As NERC stated in its reply comments, the question of "whether there is a need for the BES Definition to encompass a contiguous BES" was one of the issues that was left open, to

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[18] As NERC stated in its Petition for Approval at 19, "The maximum amount of generation allowed on the radial facility is sufficient to allow small utilities to continue to provide service options that support reliability of the interconnected electric transmission system, while not operating to exclude larger generators from the BES." *See also* Exh. G of the NERC Petition for Approval, Technical Justification for the "Local Network Exclusion" at 3 ("By placing this generation restriction on the local network, it is ensured that that the candidate facility will not under any circumstance act as a host to generation that exceeds the existing aggregate generation threshold in the ERO Statement of Compliance Registry Criteria (SCRC) and that the candidate facility will not contain Blackstart Resources.").

be addressed in Phase 2. NERC Reply Comments at 7;[19] *see also* NERC Petition for Approval at 48. The Final Rule improperly circumvents the process underway at NERC, failing to give due weight to the technical expertise of the ERO on the technical issue of whether the BES must be contiguous.

The Commission should reverse its directives as to the implementation of the generation limits in Exclusions E1 and E3. If the Commission determines that more is needed to address its concerns, it should use the same process that it directed in Final Rule P 206, i.e., directing NERC to file, within a year after the implementation date, information "identifying in sufficient detail the types of local network configurations that have been excluded from the bulk electric system under th[ese] exclusion[s]." Indeed, Phase 2 of the BES definition project at NERC may overtake this issue before such a filing would be due.

D. The Commission's determinations of whether facilities are local distribution exempt from Section 215 should take place in connection with FERC review of NERC exception determinations.

The Commission erred in determining (Final Rule P 70) that it will make local distribution determinations by direct Petition, apparently outside of the NERC exceptions process. Without questioning the Commission's decision to make local distribution determinations, the apparent intent to create two independent procedures will result in redundancy, confusion, potentially conflicting determinations, and a waste of resources. The Commission should instead make clear that it will address local distribution issues if

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[19] Reply Comments of NERC In Response to NOPR (Sept. 19, 2012), eLibrary No. 20120919-5096 ("NERC Reply Comments").

raised in connection with review of NERC exception determinations, so a full record can be developed through a single, orderly process.

The Commission states that it will apply the Seven Factor Test in accordance with Order No. 888 in making local distribution determinations,[20] though it will also consider other factors as appropriate in a particular situation. Final Rule PP 69, 71. Of the seven factors set out in Order No. 888, factors 2, 3, 4, and 7 are very similar to components of the BES core definition and exclusions, and to items on the "Detailed Information to Support an Exception Request" form filed by NERC with the BES definition. It is thus likely that there will be significant overlap between NERC's analysis of an exception request and the Commission's analysis of a request for a finding that a facility is used in local distribution. If the Commission conducts local distribution inquiries outside the NERC exceptions process, all involved—the Commission, NERC, the Regions, and affected entities—will be faced with duplicative proceedings determining overlapping factual issues. Such a scheme would be confusing as well as unwieldy: Would NERC be bound by prior FERC determinations? Would FERC reopen NERC determinations? Are there issues that NERC would not be permitted or required to consider, or that entities

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[20] "(1) Local distribution facilities are normally in close proximity to retail customers. (2) Local distribution facilities are primarily radial in character. (3) Power flows into local distribution systems; it rarely, if ever, flows out. (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market. (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area. (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system. (7) Local distribution systems will be of reduced voltage." Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, 31,771 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

would not be permitted to raise, in the exception process? Would one process be delayed pending completion of the other process?

Further, by creating a separate, direct petition to the Commission on local distribution issues, the Final Rule would invite needless litigation before the Commission that may have been avoided by letting the NERC exception process run its course. By creating parallel processes, the Final Rule will result in a needless waste of resources by all involved, including the Commission, and undermines basic administrative law principles intended to promote efficiency (e.g., exhaustion of remedies).

To avoid these results, the Commission should grant rehearing of the Final Rule, and state that it will make local distribution determinations only in connection with review of NERC exception decisions. That way, an affected entity would be permitted to make its best case and develop a full record in its exception request to NERC, even if some of its arguments could also support a local distribution determination, without the necessity of requesting a separate determination from FERC as well. If NERC denies the exception request and concludes that the facilities at issue should be part of the BES, the affected entity could then seek Commission review of NERC's decision. In conjunction with that review, the entity should be able to raise the issue that the facilities are local distribution (in addition to the issues it raises about NERC's decision).[21] By that time, the Commission will have a robust record upon which to base its determination of the facilities' local distribution status. (If the Commission determined it was appropriate, it

[21] For clarity, the Commission may want to require that if an entity intends to raise the local distribution issue in conjunction with its request for review of NERC's decision on the exception request, the entity should identify that intent by including its petition for determination of local distribution in the title of its pleading.

could specify that it would review the determinations related to the elements' local distribution status *de novo*.) Such a single, streamlined process will facilitate prompt, orderly, and efficient determinations of which elements should be part of the BES, while respecting the Final Rule's reservation of Commission authority to make local distribution determinations. The development of a full record before NERC should enable the Commission's consideration to occur on an expedited basis.

If the Commission does not grant rehearing as requested, at minimum it should (1) explain how it intends its process for making local distribution determinations to interact with the NERC exception process, especially when similar facts are at issue, and (2) clarify that entities are not foreclosed from making all applicable arguments to NERC in the exception process.

CONCLUSION

As described above, the Commission should rehear the Final Rule. It should accept the BES definition without revisions or other directives. In addition, it should state that it will make local distribution determinations only in conjunction with review of a NERC exception decision, or at minimum, clarify the procedures it will use in making local distribution determinations.

Respectfully submitted,

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