

Briefing Note - Panel 3
How the ERO Relates to Governments:
Standards Development/Remand and Enforcement

Background

A workable relationship between the ERO and governments – and energy regulators in particular – is obviously a crucial determinant to the success of establishing a successful reliability management system that is centred on mandatory and enforceable standards. This note considers the ERO-government relationship in two crucial respects: the development/approval/remand of standards and the enforcement of those standards.

The precise relationship between the ERO and energy regulators in the United States will be determined by Congressional legislation, as reflected also in the FERC's Final Rule, when it is issued. While the precise details await these developments, the likely nature of the general relationship between the ERO and the FERC can be predicted with some confidence. The ERO will be given the primary authority to develop standards (which it may well exercise in conjunction with regional reliability entities), although these standards must receive FERC approval. Although the FERC may refuse to approve standards, it will not develop standards itself; rather it will be limited to remanding standards to the ERO for reconsideration and possible re-submission. FERC may direct the ERO to propose new or modified standards that would then go through the ERO's standard development process. With respect to enforcement, although the ERO will be given the primary responsibility for ensuring compliance with reliability standards, FERC will nevertheless be available as a necessary "backstop" to review ERO decisions if requested and ensure compliance with ERO orders (it may also be able to initiate disciplinary measures on its own).

The exact nature of the future relationship between the ERO and energy regulators in Canada is less clear. The anticipated energy legislation from the new Congress is likely once again to refer to the desirability of entering into agreements with Canada and Mexico in order to ensure the smooth functioning of reliability standards across international borders. Obviously, however, the Congressional legislation will not directly affect the ability of Canadian governments and regulators to take measures with respect to ensuring electricity reliability. As a practical matter, though, given the interconnectedness of the North American grid, the effectiveness of the ERO will be dependent on its ability to operate effectively on both sides of the border.

Standards Development/Remand

A key international challenge posed for the ERO (and its architects) is to ensure that standards development and remand processes operate smoothly despite the existence of multiple regulatory processes with an interest in, and responsibility for, reliability management. The existence of different regulators operating under their own statutory mandates means that it will never be possible to eliminate at least the theoretical

possibility of conflicting views as to appropriate reliability standards. As a practical matter, however, the possibility of such conflicts can be minimized by implementing processes that facilitate opportunities for consultation before regulators decide to approve or remand standards developed by the ERO.

One could envisage two broad types of possible processes to facilitate the development of reliability standards that will operate in multiple jurisdictions. First, it may be useful to consider a process for limited involvement of regulators in the development of standards by the ERO. This involvement need not (and probably would not) amount to very active participation in standards development. It might include, however, a right to observer status for regulators on certain ERO committees, or, at a minimum, notification to regulators of matters under consideration in the event they wish to comment on issues they view as potentially problematic. It may be that some regulators will not take advantage of such opportunities, but the existence of such opportunities may occasionally prove advantageous in anticipating and addressing regulatory concerns down the road.

The second type of process that would seem potentially useful is one that facilitated a dialogue among energy regulators. The need for such a process is obviously most compelling where there are in fact significant practical differences in regulatory approaches that emerge in the course of standards development. Whether this will in practice prove to be the case remains to be seen, but it would be prudent to at least anticipate this possibility in the design of the reliability management regime. A dialogue among regulators during both the standards development process as well as during the regulatory standards approval process could help to avoid the need for regulators to remand standards to the ERO.

The pending legislation also has the concept of a regional advisory body that can include representation of officials outside the U.S.

Enforcement

The potential challenges that the existence of multiple regulators pose to the effective and efficient development of reliability standards are, if anything, more acute when one considers how best to assure compliance with standards across international borders. The key challenge once again is how to assure regulatory coherence amongst multiple agencies. In the absence of such coherence, the potential exists for different approaches to such fundamental issues as appropriate penalties.

More seriously, there may even exist the possibility of jurisdictional conflicts in the handling of specific reliability incidents. For example, it is likely that the FERC will be given the power to modify or rescind ERO disciplinary actions (and possibly even to undertake disciplinary action itself). Presumably, also, the ERO will rely on Canadian regulators to enforce its disciplinary measures in Canada (and presumably too, Canadian regulators will wish to retain some measure of original jurisdiction over reliability incidents in Canada). How would an interjurisdictional dispute between different regulators be resolved? Such a dispute could arise, for example, in the event that the

initiation by a reliability incident in one jurisdiction was aggravated by an inadequate response in another. Faced with potential responsibility by entities in different jurisdictions, how would the decision on allocation of responsibility be addressed in the event that one of the parties disagreed with the ERO's decision on allocation of responsibility and the consequent disciplinary measures?

While it is unlikely that it will be possible to preclude entirely the possibility of an international disagreement in the enforcement of reliability standards, it may be possible, as in the development/approval/remand of standards, to introduce mechanisms into the reliability management regime that minimize the likelihood of interjurisdictional conflict. This may involve processes to facilitate the dialogue between the ERO and regulators on the one hand and amongst regulators on the other. It would also seem prudent to consider what principles and processes should apply in the event that an interjurisdictional regulatory dispute becomes unavoidable.

Questions - Panel 3: How the ERO relates to governments in Canada and the US; Standards development, approval, enforcement and penalties

Standards Development/Remand

- Within the ERO, what would be the appropriate standards development processes to ensure that the ERO can function effectively and efficiently internationally?
- What role, if any, should there be for regulatory entities in the standards development process (ie., participants, observers, commentators on drafts, etc.)?
- Similarly, should the ERO's processes help facilitate a bilateral dialogue amongst regulators either during the standards development process or during the regulatory standards approval process?
- What are the appropriate remand processes to ensure that the ERO can function effectively and efficiently internationally?

Enforcement

- What are the necessary mechanisms and parties to ensure that reliability standards are monitored and enforced in an efficient and effective manner under the envisaged ERO model, particularly given the potential for bilateral differences?
- In particular, how does the envisaged ERO ensure, or at least facilitate, bilateral regulatory coherence in monitoring and enforcement?
- How would bilateral differences in approach be resolved?
- In particular, should the principle of equality in international dispute resolution be accommodated in the event of disputes? If yes, how should this principle be accommodated?