

134 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

North American Electric Reliability Corporation

Docket No. RR10-11-001

ORDER DENYING REHEARING

(Issued March 10, 2011)

1. Nebraska Public Power District (NPPD) filed a petition for rehearing of the Commission's October 21, 2010 order conditionally approving the North American Electric Reliability Corporation's (NERC) revised *Pro Forma* Delegation Agreement, revised Delegation Agreements with eight Regional Entities, amendments to NERC's Rules of Procedure and certain Regional Entity Bylaws.¹ The request for rehearing is limited to the Commission's determination approving Section 1208 of the NERC Rules of Procedure, as amended, which governs requests by registered entities to transfer between Regional Entities. For the reasons discussed in the body of this order, we deny the petition for rehearing filed by NPPD.

I. Background

2. On June 9, 2010, as supplemented on June 17, 2010, NERC filed a petition pursuant to section 215(e)(4) and (f) of the Federal Power Act (FPA) to approve: (1) a revised *Pro Forma* Delegation Agreement; (2) revised Delegation Agreements between NERC and each of the eight Regional Entities; (3) amendments to the NERC Rules of Procedure; and (4) amendments to the Bylaws of two Regional Entities. Included in the amendments to the NERC Rules of Procedure was new Section 1208, entitled a "Process for Considering Registered Entity Requests to Transfer to Another Regional Entity." Section 1208 provides that, in order to transfer between Regional Entities, a registered entity must submit a transfer request to its current Regional Entity and the Regional Entity it wishes to join. The Regional Entities then consult regarding the request and determine if they agree or disagree that the request is appropriate based on the criteria in Section 1208.2. If one or both of the Regional Entities find the transfer request

¹ *North American Electric Reliability Corp.*, 133 FERC ¶ 61,061 (2010) (*October 2010 Order*).

appropriate, the request is submitted to NERC for approval. If the NERC Board of Trustees approves the transfer, the Regional Entities' amended Delegation Agreements are filed with the Commission for approval. The transfer is not effective unless it is approved by the Commission.

3. On July 9, 2010, NPPD filed a motion to intervene and protest and, separately, a motion for clarification. In the protest, NPPD asked the Commission to reject Section 1208 of the NERC Rules of Procedure and identify certain minimum requirements to be included in a revised transfer request process. The motion for clarification asked the Commission to confirm that Section 1208, in the event it was approved, would not govern NPPD's pending request to transfer between Regional Entities (from Midwest Reliability Organization to SPP Regional Entity).

4. The October 2010 Order approved Section 1208 without modification and clarified that Section 1208 is prospective and would not govern NPPD's pending request to transfer Regional Entities.

II. Request for Rehearing

5. NPPD contends that the Commission erred by: (1) not adopting criteria for reviewing requests to transfer that are consistent with section 215 of the FPA; (2) not providing a reasoned explanation for rejecting NPPD's argument that the proposed criteria are unreasonably biased towards consideration of the "financial impacts" of the transfer on the Regional Entity budgets and assessments; and (3) not directing NERC to amend its Rules of Procedure to implement the Commission's conclusion that registered entities have adequate due process to the extent that they have the right to appeal adverse decisions to the Commission.

III. Discussion

A. Criteria for Evaluating Transfer Requests

October 2010 Order

6. The October 2010 Order approved Section 1208 without modification.² The Commission found that the process set out in Section 1208 provides registered entities with the ability to request a transfer between Regional Entities and affords sufficient procedural safeguards to ensure that the registered entity's request is considered. The Commission, however, concluded that a registered entity does not have the right to choose its Regional Entity and that the consistent treatment of registered entities across the Regional Entities should make transfers the exception and not the rule.

² *Id.* P 72.

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7. In approving the transfer criteria set forth in Section 1208, NPPD argues that the Commission erred in three ways. First, NPPD argues that the Commission did not address the argument that Section 1208 makes the “financial impacts” of a transfer “the determinative factor as to whether a transfer is appropriate,” thus creating a bias towards maintaining the status quo.³ Second, NPPD argues that making “financial impacts” the “determinative factor” is contrary to section 215(e)(4)(C) of the FPA because it does not “promote effective and efficient administration of bulk power system reliability.”⁴ NPPD further argues that the section 215(e)(4)(C) language should be explicitly incorporated into Section 1208 of NERC’s Rules of Procedure. Third, NPPD argues that the Commission should have evaluated the transfer request process in Section 1208 from the standpoint of whether the transfer’s benefits to the registered entity improve the efficiency and effectiveness of Bulk-Power System reliability, and not merely whether the transfer improves the efficiency and effectiveness of NERC and the Regional Entities’ administration of reliability.

Commission Determination

8. The Commission denies NPPD’s request for rehearing on this issue. Section 1208.2 of NERC’s Rules of Procedure provides, in relevant part:

In evaluating the proposed transfer, the regional entities shall consider the location of the registered entity’s bulk power system facilities in relation to the geographic and electrical boundaries of the respective regions; the impacts of the proposed transfer on other bulk power system owners, operators and users; the impacts of the proposed transfer on the current and future staffing, resources, budgets and assessments to other load-serving entities of each regional entity, including the sufficiency of the proposed transferee regional entity’s staffing and resources to perform compliance monitoring and enforcement activities with respect to the registered entity; the registered entity’s compliance history with its current regional entity; and the manner in which pending compliance monitoring and enforcement matters concerning the registered entity would be transitioned from the current regional entity to the transferee regional entity; along with any other

³ NPPD November 22, 2010 Petition for Rehearing at 4.

⁴ *Id.* at 5. Section 215(e)(4)(C) of the FPA provides that the Electric Reliability Organization is authorized to enter into a delegation agreement with a Regional Entity provided that “the agreement promotes effective and efficient administration of bulk-power system reliability.”

reasons for the proposed transfer stated by the registered entity and any other reasons either regional entity considers relevant.

This provision identifies numerous criteria for a Regional Entity to consider when evaluating a transfer request. While Section 1208.2 identifies “future staffing, resources, budgets and assessments,” we are not persuaded by NPPD’s argument that “financial impacts” of a transfer are the “determinative factor.” Rather, we find that the criteria developed by NERC for evaluating transfer requests by registered entities are reasonable and are not unduly based on “financial impacts.”

9. NPPD argues that Section 1208 is inconsistent with the standard found in section 215(e)(4)(C) of the FPA.⁵ We are not persuaded by this argument for two reasons. First, section 215(e)(4)(C) addresses regulations for authorizing the Electric Reliability Organization (ERO) to enter into delegation agreements with Regional Entities and requires that the agreements “promote[] effective and efficient administration of bulk-power system reliability.” Amendments to the NERC Rules of Procedure, however, are reviewed by the Commission under section 215(f) of the FPA, which requires that the proposed change is “just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c).” Second, even if we applied the section 215(e)(4)(C) standard, Section 1208 identifies specific criteria to inform the analysis of whether the proposed registered entity transfer promotes effective and efficient administration of Bulk-Power System reliability. Accordingly, while the section 215(e)(4)(C) language does not appear verbatim in Section 1208, it is clear that the Section 1208 criteria are designed to promote effective and efficient administration of Bulk-Power System reliability. As we explained in the October 2010 Order, the Commission will review transfers of registered entities between Regional Entities based on that overriding consideration.⁶

10. Finally, we are not persuaded that Section 1208 bars NERC or a Regional Entity from considering whether a transfer will improve the registered entity’s contribution to Bulk-Power System reliability. As stated above, Section 1208.2 requires the Regional Entity to consider “any other reasons for the proposed transfer stated by the registered entity and any other reasons either regional entity considers relevant.”

11. For the above reasons, we deny NPPD’s request for rehearing on this issue.

⁵ *Id.*

⁶ October 2010 Order, 133 FERC ¶ 61,061 at P 72.

B. Appeals to the Commission**October 2010 Order**

12. Section 1208.6 of the NERC Rules of Procedure provides that:

If the NERC Board of Trustees disapproves a proposed transfer presented to it . . . the regional entity or entities that believe the transfer is appropriate may, if requested to do so by the registered entity, file a petition with FERC . . . requesting that FERC order amendments to the delegation agreements of the two registered entities to effectuate the proposed transfer.

13. The October 2010 Order concluded that Section 1208 provides sufficient procedural safeguards to ensure that a registered entity's transfer request is adequately considered.⁷ The Commission agreed with NERC that "the registered entities' due process rights are further preserved under NERC's proposal because an aggrieved registered entity has the option of appealing a decision of the NERC Board of Trustees to the Commission."⁸

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14. NPPD argues that the October 2010 Order errs in stating that a registered entity's due process rights are preserved under Section 1208 because an aggrieved registered entity has the option of appealing a decision of the NERC Board of Trustees to the Commission. NPPD argues that a registered entity does not have a right of direct appeal to the Commission if NERC renders an adverse decision. The error, NPPD argues, exists because under Section 1208 a Regional Entity "may," but is not required, to make an appeal to the Commission when requested to by the registered entity. Since the registered entity does not have a unilateral right to a Commission appeal, independent of a Regional Entity, NPPD argues that its due process rights are not preserved.

Commission Determination

15. We deny NPPD's request for hearing on this issue. In the October 2010 Order, the Commission concluded that a "registered entity does not have a right to choose the Regional Entity that will be its Compliance Enforcement Authority."⁹ Changes to Regional Entity boundaries, we explained, should be carefully considered and should

⁷ *Id.* P 74.

⁸ *Id.*

⁹ *Id.* P 72.

serve to improve the effectiveness or efficiency of the Regional Entity rather than to benefit any one registered entity.¹⁰ We also stated our expectation that Section 1208 will be used sparingly because of the consistent treatment of registered entities across the Regional Entities.¹¹ In its petition for rehearing, NPPD agrees that a registered entity does not have the right to choose its Regional Entity.¹² Accordingly, without the right to choose its Regional Entity, a registered entity does not have a unilateral right to appeal an adverse decision by the NERC Board of Trustees denying a transfer. NPPD's argument is, therefore, untenable because it rests on a right that NPPD agrees does not exist and is potentially incompatible with the Regional Entities' effective administration of reliability.

16. The Commission appeal provision in Section 1208.6 provides all registered entities with an adequate level of due process when appealing adverse decisions of the NERC Board of Trustees. Under Section 1208.6, a registered entity may appeal an adverse decision to the Commission provided at least one of the involved Regional Entities agrees that the appeal is appropriate. Requiring the participation of at least one Regional Entity to bring an appeal before the Commission is consistent with the statutory criteria set forth in section 215(f) of the FPA, that an ERO rule or rule change is to be "just, reasonable, not unduly discriminatory or preferential, and in the public interest." As discussed above, changes in Regional Entity boundaries must be measured in terms of improving the administration of reliability by the Regional Entity and should not be measured solely in terms of the benefits that might flow to a single registered entity from transferring Regional Entities.

17. Finally, requiring Regional Entity participation in Section 1208.6 is no different from requiring Regional Entity participation in Sections 1208.3 and 1208.4, to which NPPD does not object. Section 1208.6 allows for Commission appeal if the registered entity requests that a Regional Entity make an appeal and the Regional Entity agrees to do so. This provision is similar to Sections 1208.3 and 1208.4, which together permit the NERC Board of Trustees to consider a registered entity's transfer request provided at least one of the relevant Regional Entities supports the proposed transfer. NPPD has not objected to these provisions. Applying the same condition to an appeal to the Commission from a NERC Board of Trustees decision – the support of at least one

¹⁰ *Id.*

¹¹ *Id.* P 73.

¹² NPPD November 22, 2010 Petition for Rehearing at 2 ("Specifically, NPPD agrees that a process for approving requests for transfer is essential and that a registered entity does not have a right to choose the Regional Entity that will be its Compliance Enforcement Authority").

interested Regional Entity – strikes the same balance between the interests of the registered entity and the two relevant Regional Entities as in Sections 1208.3 and 1208.4.

18. Accordingly, we deny NPPD’s request for rehearing on this issue.¹³

The Commission orders:

The Commission hereby denies the petition for rehearing filed by NPPD, for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ As we stated in the October 21 Order, Section 1208 does not govern NPPD’s pending request to transfer from the Midwest Reliability Organization to SPP Regional Entity. October 2010 Order, 133 FERC ¶ 61,061 at P 75.