

125 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

Direct Energy Services, LLC	Docket Nos. RC07-4-003
Sempra Energy Solutions, LLC	RC07-6-003
Strategic Energy, L.L.C.	RC07-7-003

ORDER ON COMPLIANCE FILING

(Issued October 16, 2008)

1. On July 31, 2008, the North American Electric Reliability Corporation (NERC) submitted a compliance filing in response to a December 20, 2007 Order¹ that (1) reversed a NERC decision to register three retail power marketers to comply with Reliability Standards applicable to load serving entities (LSEs) and (2) directed NERC to submit a plan describing how it would address a possible “reliability gap” that NERC asserted would result if these retail power marketers were not registered as LSEs. In the July 31 compliance filing, NERC proposed, as a short-term solution, revisions to the NERC Statement of Compliance Registry Criteria (Registry Criteria)² to provide that a distribution provider to whose system the electric loads in retail choice areas are connected will be registered as the LSE for all loads connected to its system. NERC asks the Commission to approve the proposed changes to the Registry Criteria. As discussed below, the Commission approves the NERC’s compliance filing and revisions to the Compliance Registry.

Background

Prior Commission Orders

2. On September 11, 2007, Direct Energy Services, LLC (Direct), Sempra Energy Solutions LLC (Sempra) and Strategic Energy, L.L.C. (Strategic), each filed with the Commission an appeal of a determination by NERC that each was properly registered as

¹ *Direct Energy Services, LLC*, 121 FERC ¶ 61,274 (2007) (December 20 Order).

² *See Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 92-95 (2007), *order on reh’g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007) (approving NERC Registry Criteria).

a load-serving entity (LSE) by ReliabilityFirst Corporation, a Commission-approved Regional Entity. Direct, Sempra and Strategic, which are authorized by the Commission to sell energy at market-based rates, assented to registration as a purchasing-selling entity, but objected to registration as an LSE. In the December 20 Order, the Commission granted the appeals and reversed NERC's determinations, finding that the registration of the retail marketers as LSEs was not supported by the record or NERC's registry criteria. The Commission also directed NERC to submit a plan describing how it would address a possible "reliability gap" that NERC asserted would result if the retail marketers were not registered as LSEs.³

3. On March 4, 2008, NERC submitted a compliance filing proposing a two-step process to address the potential reliability gap. In the short term, NERC proposed to develop, through an open comment process, revisions to its Registry Criteria to define "Non-Asset Owning LSEs" as a subset of LSEs and specify the Reliability Standards applicable to that "subset." In the longer-term, NERC proposed to determine the changes necessary to terms and requirements in Reliability Standards and process them through execution of NERC's three-year Reliability Standards Development Plan. In an April 4, 2008 order, the Commission accepted the procedural aspects of a NERC compliance filing that included a short-term plan and a long-term plan to address the potential reliability gap. The Commission explained that it would address the substantive proposal when fully developed and explained pursuant to a future NERC filing.⁴

NERC Compliance Filing

4. On July 31, 2008, NERC filed its short term plan to address the reliability gap that would result if there were no LSE registered on behalf of end-use customer load served by retail power marketers. The short-term plan, following the NERC stakeholder process, has changed from what NERC described in its March 4, 2008 compliance filing. NERC now proposes to require that "the Distribution Provider to whose system the electric loads in retail choice areas are connected are to be registered as the LSE for all loads connected to its system for the purpose of compliance with NERC's approved reliability standards applicable to LSEs."⁵ NERC states that this approach ensures that all loads are represented in the planning and operation of the Bulk-Power System by the entity with the best information regarding those loads.

5. To implement the short-term solution, NERC requests that the Commission approve a revision to the Registry Criteria. In Section II of the Registry Criteria an LSE

³ December 20 Order at P 50.

⁴ *Direct Energy Services, LLC*, 123 FERC ¶ 61,016 (2008) (April 4 Order).

⁵ July 31, 2008 Compliance Filing at 3.

is defined as an entity that “[s]ecures energy and transmission service (and related interconnected operations services) to serve the electric demand and energy requirements of its end-use customers.” In Section III(a) of the Registry Criteria, NERC specifies criteria for registering LSEs. The amendment that NERC asks the Commission to approve is Section III.a.4 which states:

Distribution providers registered under the criteria in III.b.1 or III.b.2 will be registered as a load serving entity (LSE) for all load directly connected to their distribution facilities.

The proposed revision would also provide that a distribution provider will not be registered based on the above criterion if it has transferred responsibility to another entity (that is appropriately registered) by written agreement.

6. NERC states that, with respect to load served by retail choice through load aggregators, there may not be a clear agreement in place between the distribution providers and the load aggregators delineating the responsibilities between the parties regarding compliance with mandatory Reliability Standards. Further, the compliance filing explains that “NERC will exercise its discretion in the application of penalties or sanctions upon Distribution Providers who are providing this information on the behalf of loads served by a retail choice load aggregator until such time as both entities are either registered or the standards are updated to clarify the responsibilities for each party as ultimately indentified in the longer-term solution proposed by NERC.”⁶

Public Notice, Interventions and Comments

7. Notice of NERC’s July 31, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 46,623 (2008), with interventions and protests due on or before September 2, 2008. Timely comments and/or protests were filed by Detroit Edison Company (Detroit Edison); Direct Energy Services, LLC and Strategic Energy, L.L.C. (Direct and Strategic); Baltimore Gas Electric, Constellation Energy Commodities Group, and Constellation NewEnergy (Constellation); Exelon Corporation (Exelon); and Consumers Energy Company (Consumers Energy).

8. CenterPoint Energy Houston Electric, LLC (CenterPoint) and Oncor Electric Delivery Company LLC (Oncor) filed late protests. Texas Regional Entity (TRE), an independent division of Electric Reliability Council of Texas, Inc. (ERCOT), filed a motion to intervene out-of-time and comments.

9. NERC, Consumers and Integrys Energy Services, Inc. (Integrys) filed answers. Exelon filed an answer to NERC’s answer.

⁶ *Id.*

Comments and Protests

10. Direct and Strategic agree with NERC that distribution providers should have compliance responsibility because the electric loads are connected to the distribution provider's system. They state that distribution provider LSEs are already registered as LSEs and are capable of complying with the Reliability Standards applicable to LSEs regarding all the power they deliver, including power supplied by non-asset owning retail power marketers.

11. Consumers Energy protests that NERC's proposed short-term plan fails to comply with the Commission's earlier orders in this proceeding. According to Consumers Energy, NERC's compliance filing abandons the approach approved by the Commission in the April 4 Order.

12. Detroit Edison protests that NERC's short-term plan unfairly shifts the burden of compliance with Reliability Standards. It contends that NERC's Compliance Registry Criteria are unworkable in retail choice states, as both distribution providers and retail power marketers perform some, but neither performs all, functions assigned to LSEs.

13. Detroit Edison, Exelon and Consumers Energy all argue that NERC's proposed modification to the Registry Criteria would hold distribution providers accountable for complying with Reliability Standards over which they have no control, and point to specific examples. Detroit Edison claims that distribution providers would not be able to comply with certain Reliability Standards that apply to LSEs because distribution providers do not have the necessary information about retail power marketers forecast to comply. Detroit Edison asks that the Commission, at a minimum, set a firm deadline for the submission of a longer-term plan. Exelon suggests that NERC pursue the initial idea of adding a subset non-asset owning LSE category and specifying the applicable Reliability Standards. Consumers Energy claims that distribution providers that have divested themselves of transmission assets will be unable to comply with Reliability Standards applicable to LSEs.

14. CenterPoint, Oncor and TRE question whether NERC's proposal could work in ERCOT. CenterPoint points out that, as a distribution provider, it currently complies with the requirements of Reliability Standards that apply to both distribution providers and LSEs. However, both CenterPoint and Oncor claim that they do not perform - and are prohibited under Texas state law from performing - requirements that apply to LSEs but not distribution providers. Thus, CenterPoint asks that the Commission deny NERC's proposal and, instead, direct NERC to diligently implement a long-term solution, i.e., reviewing the requirements of Reliability Standards that currently apply to LSEs and reassigning those requirements to an appropriate registered entity.

15. TRE also states that independently owned transmission and distribution utilities in ERCOT are prohibited by law from performing certain LSE requirements. TRE explains

that, in ERCOT, retail electric providers (REPs) and qualified scheduling entities (QSEs) perform a number of LSE-related functions. However, NERC's short-term proposal would require joint registration of 120 REPs and 130 QSEs. TRE contends that such joint registration will likely lead to time-consuming registration disputes.

16. Constellation suggests an alternative approach of removing the LSE category from the compliance registry since all of the Reliability Standard requirements that apply to LSEs are, in fact, performed by entities in other functional categories.

Answers

17. In its answer, Consumers argues that Constellation improperly offered a new proposal in its comments to the compliance filing. Integrys answers that several commenters mischaracterize the history of the Commission orders and the NERC proposals in this proceeding.

18. NERC answers that its proposal is an appropriate short-term means to close the reliability gap. It points out that many distribution providers are also registered as LSEs, although acknowledging this is not so in Texas. NERC states that, under its proposed short-term plan, an entity currently registered as a distribution provider could be subject to the requirements of eight additional Reliability Standards (which NERC identifies). NERC states that its plan is reasonable because, it is "undisputed" that the distribution providers over which even retail power marketer load is served "and do, in fact, have both the infrastructure and access to information to enable them to comply" with the Reliability Standards that apply to LSEs.⁷ NERC notes that, prior to state retail access programs, distribution providers were the LSEs for the load and often today are providers of last resort. "For those limited Reliability Standards that may require information from retail power marketers, the [distribution providers] have existing mechanisms that may allow them to require retail power marketers to provide such information as part of service agreements."⁸

19. NERC recognizes the concerns of several commenters regarding the market structure and legal framework in ERCOT and indicates that concurrent or joint registration may be needed immediately. NERC states that it is committed to work with the Regional Entities to ensure that there is no gap and no overlap in coverage with respect to compliance with the LSE Reliability Standards.

20. NERC further states that it recognizes that a longer term solution is required. It acknowledges that changes to recognize legal obligations and obstacles may be required

⁷ NERC Answer at 5.

⁸ *Id.*, at 6.

and should be addressed in the long-term process. However, NERC contends that calls to immediately eliminate the LSE functional category are premature and should be rejected. Rather, NERC states that a thorough review of the requirements of Reliability Standards applicable to LSEs will occur in the Reliability Standards development process, which NERC considers the proper forum to address intervenor comments.

21. Exelon argues that NERC ignores that distribution providers do not control the required information about loads served by LSEs and, thus, distribution providers would have to rely on LSEs for information. Exelon suggests that a better approach would be to establish two categories of LSEs, those that own assets and those that do not and to hold the two categories of LSEs to different sets of Reliability Standards.

Discussion

Procedural Matters

22. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2008), we will grant TRE's late-filed motion to intervene given its interest in this proceeding and the absence of any undue prejudice or delay.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that has assisted us in our decision-making process.

Commission Determination

24. The Commission approves NERC's short-term plan and proposed revisions to the Registry Criteria to have registered distribution providers also register as the LSE for all load directly connected to their distribution facilities. While not a perfect solution, the Commission believes that NERC's short-term proposal is superior to the original plan to register retail power marketers as LSEs, and just and reasonable in its own right. The registration of the distribution provider as the LSE for all load directly connected to its distribution facilities is for the purpose of compliance with the Reliability Standards. This registration does not affect the responsibilities and rights a load aggregator may have as a LSE to secure energy and transmission service (and related interconnected operations services) to serve the electric demand and energy requirements of its end use customers.

25. As NERC explains, distribution providers have both the infrastructure and access to information to enable them to comply with the Reliability Standards that apply to LSEs. Moreover, distribution providers provide the wires over which the load of retail power marketers is served. NERC also points out that, with regard to distribution

providers that provide wires service for retail power marketers, these distribution providers were LSEs for that load prior to state retail access programs. In many instances, these distribution providers remain providers of last resort and must plan their system taking into consideration all load served over their wires, including retail access load.⁹ The Commission finds that, based on these facts, NERC acted reasonably in determining that the distribution provider is the most appropriate entity to register as the LSE for the load directly connected to its distribution facilities.

26. Consumers Energy, Detroit Edison and Exelon raise concerns whether distribution providers are capable of complying with certain requirements of Reliability Standards that apply to LSEs. We believe that these concerns, while not wholly unfounded, are adequately addressed by NERC. As indicated by NERC, it appears that many distribution providers are currently registered as LSEs as well; and some requirements of Reliability Standards apply to both types of entities. In such situations, distribution providers should currently be in compliance with LSE-related requirements. To the extent that a distribution provider is physically unable to comply with the requirement of a Reliability Standard that applies to LSEs, or is unable to obtain information necessary for compliance, NERC has indicated that “NERC will exercise its discretion in the application of penalties or sanctions upon Distribution Providers who are providing this information on the behalf of loads served by a retail choice load aggregator”¹⁰ Further, NERC has indicated a willingness to work with entities to resolve issues through joint arrangements. Likewise, NERC has acknowledged the registration concerns unique to ERCOT’s market structure and has committed to quickly resolving the matter through joint arrangements or working with the Regional Entity to develop other solutions. Thus, the Commission finds that NERC’s approach is reasonable.

27. We disagree with Consumers Energy that NERC’s proposal does not comply with our earlier directives in this proceeding. The Commission expressly stated in the April 4 Order that it accepted only the procedural aspects of NERC’s earlier compliance filing, i.e., to develop a short term plan to be followed by a long-term solution, and would address the substantive proposal when fully developed and explained by NERC. Thus, contrary to Consumer Energy’s claim, the Commission did not substantively approve an earlier plan that focused on retail power marketers.

28. We also dismiss suggestions by several commenters that we reject NERC’s proposed short-term plan and either eliminate the role of the LSE in the functional model or direct NERC to immediately address the matter through the Reliability Standards development process. While the rethinking of the role of the LSE or revision of certain Reliability Standards is a reasonable approach in the long-term, the Commission is

⁹ NERC Answer at 6.

¹⁰ *Id.*

concerned that these approaches will require a considerable period of time to implement, leaving a gap in reliability in the meantime. Rather, the Commission approves NERC's proposed short-term plan and related revisions to the Registry Criteria. Interested entities should participate in NERC's Reliability Standards development process to assure that their concerns are considered in the development of a long-term approach to the matter.

The Commission orders:

(A) NERC's July 31, 2008 compliance filing is hereby approved, as discussed in the body of this order.

(B) NERC's revised Statement of Compliance Registry Criteria is hereby approved, as discussed in the body of this order.

By the Commission.

Kimberly D. Bose,
Secretary.