

141 FERC ¶ 61,108
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

U.S. Department of Energy,
Portsmouth/Paducah Project Office

Docket Nos. RC08-5-002
RC08-5-003

ORDER ON REHEARING AND CLARIFICATION AND COMPLIANCE
FILING

(Issued November 7, 2012)

1. In this order, the Commission denies rehearing and clarification of its April 19, 2012 order in this proceeding.¹ In the April 2012 Order, the Commission determined that the North American Electric Reliability Corporation (NERC) failed to support its claim that the United States Department of Energy, Portsmouth/Paducah Project Office (DOE Portsmouth) should be registered as a load-serving entity (LSE) under NERC's Compliance Registry.

2. Further, in the April 2012 Order, the Commission directed NERC to either register Ohio Valley Electric Corporation (OVEC) as the LSE or submit a compliance filing to show cause explaining why OVEC should not be registered for the LSE function.² In a July 18, 2012 compliance filing, NERC chose the latter course to show cause and explain why OVEC should not be registered as the LSE. As discussed below, we find that NERC's compliance filing fails to adequately explain why OVEC should not be registered and, thus, we direct that NERC register OVEC as the LSE for the DOE Portsmouth load.

¹ *U.S. Department of Energy, Portsmouth/Paducah Project Office*, 124 FERC ¶ 61,072 (2008) (July 2008 Order) (remanding NERC registration of DOE Portsmouth as a load-serving entity (LSE)), *order on compliance filing*, 139 FERC ¶ 61,054 (2012) (April 2012 Order).

² April 2012 Order, 139 FERC ¶ 61,054 at P 34.

I. Background

A. NERC Registry Criteria

3. As explained more fully in the April 2012 Order, NERC identifies entities that should be registered for compliance with mandatory Reliability Standards pursuant to NERC's Statement of Compliance Registry Criteria (Registry Criteria).³ The Registry Criteria define an LSE as an entity that "secures energy and transmission service (and related interconnected operations services) to serve the electrical demand and energy requirements of its end-use customers."

B. The DOE Portsmouth Facility and OVEC

4. DOE Portsmouth owns the Portsmouth Gaseous Diffusion Plant near Piketon, Ohio, a uranium enrichment plant (facility). The facility includes a switchyard, which allows power to be directed to load-serving step-down transformers to serve the facility's load of approximately 25-45 MW. DOE Portsmouth leases the facility to the United States Enrichment Corporation (USEC). In addition, DOE Portsmouth allows the Ohio National Guard to use a portion of the facility and hires contractors to perform remediation and other work at the site.

5. Electricity is provided to the site under a short-term, arranged power agreement between OVEC and DOE Portsmouth. DOE Portsmouth is interconnected to the transmission system of OVEC, which is a special-purpose corporation that was formed for the express purpose of supplying the electric power requirements of DOE Portsmouth.⁴ OVEC is a transmission-owning public utility, subject to the Commission's open access transmission requirements and operates two generating facilities. OVEC describes DOE Portsmouth as its sole bundled retail customer served under the short-term, arranged power service agreement (2003 Letter Agreement) approved by the Public Utilities Commission of Ohio (Ohio PUC). OVEC owns and operates a transmission system and uses its transmission facilities to transmit power from bidders to DOE Portsmouth and from its generators to its owners.⁵

³ April 2012 Order, 139 FERC ¶ 61,054 at P 3.

⁴ See July 2008 Order, 124 FERC ¶ 61,072 at P 52; OVEC Open Access Transmission Tariff, Attachment M, Transmission Planning Process, Sheet No. 404, Docket No. OA08-19-000 (filed December 7, 2007).

⁵ For additional information regarding the DOE Portsmouth facility, see July 2008 Order, 124 FERC ¶ 61,072 at PP 6-8; April 2012 Order, 139 FERC ¶ 61,054 at PP 4-5.

C. Commission Registration Decisions

6. In the July 2008 Order, the Commission approved NERC's registration of DOE Portsmouth as a transmission owner, transmission operator and distribution provider. The Commission, however, expressed concern whether the record adequately supported NERC's determination that DOE Portsmouth is properly registered as an LSE.⁶ Thus, the Commission remanded this issue to NERC for further consideration and directed NERC to submit either a revised registration determination providing further support or a notice that DOE Portsmouth should not be registered as an LSE.

7. In response, on October 6, 2008, NERC submitted a "Board of Trustees Compliance Committee Decision on Remand" (Remand Decision) providing additional information to support its earlier decision to register DOE Portsmouth as an LSE. NERC confirmed "that the entire load at the DOE Portsmouth site . . . is served by [DOE Portsmouth] through its short-term, arranged power contract with OVEC."⁷ In addition, NERC noted that "USEC and other third parties are engaged in a variety of for-profit activities on the [DOE Portsmouth] site, as lessor or sub-lessor of property and buildings and/or as contractor or sub-contractor to [DOE Portsmouth], USEC or others on the site."⁸

8. In the April 2012 Order, the Commission found that NERC failed, on remand, to adequately support its assertion that DOE Portsmouth is properly registered as an LSE. The Commission considered whether DOE Portsmouth satisfied the NERC definition of LSE, i.e., an entity that "secures energy and transmission service (and related interconnected operations services) to serve the electrical demand and energy requirements of its end-use customers," as follows:

We agree based on the facts in this proceeding with DOE Portsmouth's assertion that its procurement of electricity to meet the Government's needs at the DOE Portsmouth site needs that are fulfilled by the operations of the contractors and lessees on the site does not make the contractors and lessees its customers and does not support registration as a [LSE]. DOE receives no payment from the contractors, other than compensation via lease payments, and these payments do

⁶ See July 2008 Order, 124 FERC ¶ 61,072 at PP 48-52.

⁷ *Id.* (citing OVEC August 28, 2008 letter at 2, Attachment D to the NERC Remand Decision).

⁸ *Id.*

not include a fee for service, but merely serve to allocate the costs of electricity to the various consumers on site.

DOE Portsmouth acknowledges that it supplies electricity to its contractors for the Government's needs at the site, and that its contractors are third parties. However, the fact that third party contractors and lessees use power on the site is insufficient to establish that it is a [LSE] under the Registry Criteria. The issue of who uses the power does not establish whether an entity has undertaken the responsibility to secure energy and transmission service in order to meet an obligation to provide electrical service to customers, consistent with the Registry Criteria definition of [LSE]. ... DOE Portsmouth secures energy to perform its statutory duties on the site, which include contracting out construction and operation of the facilities needed to perform its uranium enrichment activities, through its arrangements with USEC.

We conclude that the presence of USEC and its for-profit activities centered around the American Centrifuge Project does not convert DOE Portsmouth's procurement of electric service into an independent endeavor to provide or resell that service to the entities located on the DOE Portsmouth site.⁹

9. In the April 2012 Order, the Commission rejected NERC's assertion that it is sufficient that the contractors are "consuming" and "not reselling" electricity supplied by DOE Portsmouth to support registration. NERC concluded that the contractors were, on that basis, end-use customers as that term is well understood in the energy industry. The Commission found, "under the facts in this proceeding," DOE Portsmouth's undertaking to ensure that electricity is available for the use of its lessees "is insufficient to establish that it has undertaken the responsibility to provide electric service" as an LSE.¹⁰

10. The Commission also cited the fact that no party alleged that DOE Portsmouth is eligible to be or become a competitive electric service supplier under Ohio law. The Commission cited this fact to show that DOE Portsmouth did not seek out the lessees and contractors to provide electric service, and thus did not undertake the responsibility to

⁹ *Id.* PP 26-28 (footnotes omitted).

¹⁰ *Id.* P 30.

serve the load. The Commission noted that, under Ohio law, OVEC must serve the load, and DOE Portsmouth must contract with OVEC for retail electric service.¹¹

11. Finally, while indicating that the record supported registration of OVEC as the LSE serving the DOE Portsmouth load, the Commission did not make any conclusions with regard to OVEC in the April 2012 Order. Rather, the Commission directed NERC to either register OVEC as the LSE through the NERC compliance registration process or submit a filing showing cause why OVEC should not be registered as the LSE.¹²

II. Request for Rehearing and Clarification

12. NERC seeks rehearing, arguing that that the April 2012 Order is not consistent with the Registry Criteria and is not consistent with the Commission precedent. NERC states that an entity identified as an LSE (pursuant to the LSE definition) should be excluded from the Compliance Registry if it does not meet the following criteria:

IIIa.1. The LSE's peak load is greater than 25 MW and is directly connected to the Bulk Power (>100 kV) System; ...

IIIa.4. Distribution Providers registered under the criteria in section III.b.1 or III.b.2 will be registered as an LSE for all load directly connected to their distribution facilities, unless responsibility for compliance with the relevant standards has been transferred by written agreement to another entity that has registered for the appropriate function.¹³

NERC contends that DOE Portsmouth satisfies the above registry criteria, noting that DOE Portsmouth's load is greater than 25 MW and is directly connected to the 345 kV network. Further, NERC states that DOE Portsmouth is a registered distribution provider. NERC opines that the April 2012 Order "inexplicably" failed to reference Section IIIa.4 of the Registry Criteria, even though the Commission had previously found

¹¹ *Id.* P 31.

¹² *Id.* P 34.

¹³ NERC May 21, 2012 Rehearing at 2; *see also* NERC Rules of Procedure, App. 5B (Statement of Compliance Registry Criteria), Revision 5.1 (effective January 31, 2012).

appropriate that a distribution provider be registered as the LSE for all load directly connected to its distribution facilities.¹⁴

13. Next, NERC argues that a portion of the power purchased by DOE Portsmouth from OVEC is subsequently resold to a third party who compensates DOE Portsmouth for the power. NERC quotes DOE Portsmouth's response to a NERC request for information:

A small portion of the electricity delivered to the site pursuant to the OVEC power agreement is used by USEC Inc. [footnote omitted] in support of its commercial uranium enrichment venture known as the American Centrifuge Project of ACP. ... DOE is paid by USEC under the Services Agreement for the electricity used by USEC Inc. to support its operation of the ACP. Payment to DOE for electricity is based on actual monthly usage by ACP (pro-rata share of site usage).¹⁵

According to NERC, DOE Portsmouth's response contradicts the finding in the April 2012 Order that DOE Portsmouth's procurement of electric service is not an "independent endeavor to provide or resell that service to the entities located on the DOE Portsmouth site."¹⁶ NERC argues that, in light of the clear language of the Registry Criteria, it is irrelevant that compensation is made on a *pro rata* basis or that the arrangement to supply USEC has its origins on prior activities on the site.¹⁷

14. NERC also contends that OVEC provides power to DOE Portsmouth through a month-to-month contract under which OVEC purchases a block of power in the wholesale market sufficient to meet DOE Portsmouth's peak demand with required reserves. NERC states that DOE Portsmouth is the entity responsible for determining its load profile, pricing and transmission service.¹⁸ According to NERC, because DOE

¹⁴ NERC Rehearing at 3, citing *Direct Energy Services, LLC*, 125 FERC ¶ 61,057 (2008) (*Direct Energy*).

¹⁵ NERC Rehearing at 3, *quoting*, October 6, 2008 NERC Compliance Filing, Attachment C (DOE Portsmouth Response to Request for Information (Sept. 5, 2008)).

¹⁶ April 2012 Order, 139 FERC ¶ 61,054 at P 28.

¹⁷ NERC Rehearing at 4.

¹⁸ *Id.* (citing Reliability First Comments at 8 and Attachment A, Reliability First Assessment of DOE Portsmouth registration appeal).

Portsmouth has the ability to purchase from other wholesale and retail suppliers in the region at short notice, “OVEC’s role is arguably more similar to that of a power marketer than that of an LSE.”¹⁹

15. In addition, NERC seeks clarification that the April 2012 Order is bound by the unique facts of the case and is not intended to apply generally to other entities and situations. NERC notes that this is consistent with other decisions on registration appeals.²⁰

III. NERC Compliance Filing

16. On July 18, 2012, NERC submitted a compliance filing in response to the April 2012 Order. NERC explains that it did not register OVEC for the LSE function, believing that it was appropriate for the Commission to first consider NERC’s request for rehearing and clarification. According to NERC, no significant gap in reliability will result from a delay in this case. NERC asks that it be allowed to defer registration of OVEC as an LSE for 30 days after the Commission’s order on rehearing, as appropriate.

17. The Commission issued notice of the July 19, 2012 compliance filing, with comments due on August 8, 2012. No comments were filed.

IV. Commission Determination

A. Request for Rehearing

18. We deny NERC’s request for rehearing and affirm the Commission’s holding in the April 2012 Order that NERC has not adequately supported its claim that DOE Portsmouth should be registered as an LSE. We affirm the findings in our prior orders that the facts in this proceeding, chiefly concerned with DOE Portsmouth’s role in monitoring power use and negotiating with OVEC over terms of service, are insufficient to establish that DOE Portsmouth is an LSE serving “customers” under the Registry Criteria definition.²¹ We address NERC’s positions on rehearing, below.

¹⁹ *Id.*

²⁰ *Id.* at 5, citing, *New Harquahala Generating Company, LLC*, 123 FERC ¶ 61,173, *order on clarification*, 123 FERC ¶ 61,311 (2008).

²¹ *See* April 2012 Order, 139 FERC ¶ 61,054 at P 30; July 2008 Order, 124 FERC ¶ 61,072 at PP 52-53.

19. First, NERC argues on rehearing that the April 2012 Order is inconsistent with the Registry Criteria for LSEs and Commission precedent. According to NERC, DOE Portsmouth clearly satisfies the Registry Criteria thresholds for registration of LSEs. We are not persuaded by NERC's analysis. Before applying the Registry Criteria thresholds for LSEs in Part III(a) of the Registry Criteria, it must first be determined whether an entity is an LSE pursuant to NERC's definition set forth in Part II of the NERC Registry Criteria.²² The April 2012 Order concluded that DOE Portsmouth does not satisfy that definition. Thus, failure to reference the Registry Criteria thresholds for LSEs is not "inexplicable" as claimed by NERC.

20. NERC contends that the April 2012 Order is inconsistent with an earlier Commission order, *Direct Energy*, as approving revisions to the Compliance Registry to have registered distribution providers also register as the LSE for all load directly connected to its distribution facilities. We disagree that our decision in the April 2012 Order is inconsistent with *Direct Energy*, or that *Direct Energy* requires another result in the immediate proceeding. In *Direct Energy*, the Commission was faced with the situation where retail marketers were registered as LSEs for serving electric loads in retail choice areas. The Commission found that, because the retail power marketers owned no physical electric facilities, they were not LSEs because their loads were not directly connected to the Bulk-Power System.²³ However, to avoid a possible "reliability gap," the Commission directed NERC to develop a consistent, uniform approach to ensure that appropriate Reliability Standards are applied to retail marketers. DOE Portsmouth is not a retail marketer. Rather, both the facility and financial arrangements in the immediate case present unique circumstances that distinguish it from our concerns in *Direct Energy*.

21. Second, NERC contends that the April 2012 Order erred in finding that DOE Portsmouth does not make sales for resale because the record in the proceeding shows that a portion of the power purchased by DOE Portsmouth from OVEC is subsequently used by a third party, USEC's affiliate, USEC Inc., for its for-profit uranium enrichment effort the American Centrifuge Project, with USEC paying DOE Portsmouth for the power under the site Services Agreement.²⁴ We disagree that this arrangement demonstrates that DOE Portsmouth secures energy and transmission service to serve

²² As explained earlier, NERC defines an LSE as an entity that "secures energy and transmission service (and related interconnected operations services) to serve the electrical demand and energy requirements of its end-use customers."

²³ See *Direct Energy*, 125 FERC ¶ 61,057 at PP 24-25.

²⁴ Rehearing at 3.

USEC and the other occupants as its electric customers, as required by the Registry Criteria definition of LSE. DOE Portsmouth leases the facility to USEC and the Ohio National Guard. As part of its lease, USEC does not purchase its own electric service. Instead, DOE Portsmouth purchases the electric service for the entire site and meters electricity to determine how much is used by the lessees and contractors.²⁵ The April 2012 Order found that these arrangements do not establish that DOE Portsmouth is the load-serving entity for the site.²⁶ NERC's request for rehearing provides no new information that persuades us to change this determination.²⁷

22. Third, NERC disagrees with the Commission's statement that OVEC appears to be the better choice as LSE as the entity serving DOE Portsmouth's load. According to NERC, because DOE Portsmouth has the ability to purchase from other wholesale and retail suppliers in the region at short notice, "OVEC's role is arguably more similar to that of a power marketer than that of an LSE."²⁸ We disagree. OVEC is a public utility with a rate on file with the Ohio PUC for retail service to DOE Portsmouth. Therefore, its role in providing service is greater than that of a power marketer making transactions on the open market. Furthermore, OVEC operates the interconnected transmission facilities over which service is provided to DOE Portsmouth under the retail service agreement and over which it engages in interconnected operations with neighboring transmission systems. NERC has failed to support its claim that DOE Portsmouth may purchase power from other retail suppliers in the region on short notice. Likewise,

²⁵ As reflected in the July 2008 Order, NERC did not originally consider the landlord-lessee relationship between DOE Portsmouth and USEC to constitute a sale. Instead, NERC stated, "Power consumed by individual facilities on site is metered by DOE. However, the metering is not used to sell power to others. Rather the metering is used to calculate each organization's portion of the total DOE bill." July 2008 Order, 124 FERC ¶ 61,072 at P 51 n.28 (citing NERC's Apr. 22, 2008 Registry Decision at 1).

²⁶ See April 2012 Order, 139 FERC ¶ 61,054 at PP 26-28.

²⁷ NERC, in essence, rehashes the issue of how to view DOE Portsmouth's lease agreements. In an earlier pleading, DOE Portsmouth explained that it "suppl[ies] electricity to contractors at the site, at no cost/charge to the contractors, as a Government Furnished Services and Items (GFSI). [DOE Portsmouth] supplies electricity to its contractors to secure energy for the Government's needs at the site. NERC is incorrect in implying that in supplying electricity to its contractors, DOE-PPPO is securing energy for needs other than its own." DOE Portsmouth, Nov. 5, 2008 Comments at 2. See also April 2012 Order, 139 FERC ¶ 61,054 at P 28.

²⁸ NERC Rehearing at 4.

NERC has failed to adequately rebut DOE Portsmouth's citation to the Ohio PUC statement that it would not "support any entity other than OVEC supplying power to the Portsmouth site."²⁹ Furthermore, in the April 2012 Order, the Commission took notice of the Ohio PUC decision finding that OVEC would not be subject to retail choice restructuring to permit other suppliers to serve the DOE Portsmouth load.³⁰ Thus, contrary to NERC's supposition, DOE Portsmouth cannot at present purchase power from other suppliers, but must continue to purchase power from OVEC under their negotiated agreement.

23. Finally, NERC seeks clarification that the Commission's decision is "bound by" the unique facts of the case and is not intended to apply generally to entities that secure energy and transmission service on their own behalf and that own and operate distribution facilities. The April 2012 Order makes clear that the Commission's determination is based on the facts unique to the immediate proceeding.³¹ Consequently, no clarification is necessary.

B. Compliance Filing

24. In the April 2012 Order, the Commission directed NERC to register OVEC as the load-serving entity or show cause for its failure to do so.³² In its July 2012 compliance filing, NERC chose the latter course to show cause and explain why OVEC should not be registered as the LSE. NERC maintains that DOE Portsmouth is the better candidate for the LSE function, as it satisfies the registry criteria for LSE registration, while NERC likens OVEC's role to that of a power marketer. Further, NERC states that no significant gap in reliability will result from a delay in registering an entity as the LSE while NERC's request for rehearing is pending before the Commission. Thus, NERC asks that it be allowed to defer registration of OVEC as an LSE for 30 days after the Commission's order on rehearing, as appropriate.³³

²⁹ *Id.* at 4 & n.17.

³⁰ *See* April 2012 Order, 139 FERC ¶ 61,054 at P 31 & n.37.

³¹ *See* April 2012 Order, 139 FERC ¶ 61,054, at PP 26 ("[w]e agree based on the facts in this proceeding..."), 30 ("[w]e find, under the facts in this proceeding...") and 32 ("[b]ased on this record, we grant DOE Portsmouth's appeal...").

³² *Id.* P 34 and Ordering Paragraph (C).

³³ Although this is not the normal course of Commission practice, 18 C.F.R. § 385.713(e) (2012), in these narrow circumstances where the Commission provided NERC the opportunity to show cause, NERC's approach is allowable.

25. NERC has failed to show cause for its failure to register OVEC as the load-serving entity. As discussed above, we reject NERC's arguments on rehearing in favor of registering DOE Portsmouth instead of OVEC. The record in this proceeding reflects that OVEC has served DOE Portsmouth's load since 1954 under a 2003 Letter Agreement and predecessor agreements. OVEC purchases power to serve the load, operates an interconnected transmission system and transmits the power over its own facilities to deliver the power to DOE Portsmouth, as its retail customer. In addition, OVEC claims the DOE Portsmouth load as its native load, which NERC defines in its glossary as "The end-use customers that the Load-Serving Entity is obligated to serve."

26. Accordingly, we direct NERC to register OVEC as the LSE for the DOE Portsmouth load and submit a further compliance filing confirming that it has done so within 30 days of this order.

The Commission orders:

(A) The Commission denies NERC's request for rehearing and clarification, as discussed in the body of this order.

(B) The Commission finds that NERC has failed to show cause why OVEC should not be registered as a load-serving entity for the DOE Portsmouth load, as discussed in the body of this order.

(C) The Commission hereby remands this matter to NERC to register OVEC through the NERC compliance registration process as a load-serving entity, as discussed in the body of this order.

By the Commission. Commissioner Norris is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

U.S. Department of Energy,
Portsmouth/Paducah Project Office

Docket No. RC08-5-002
RC08-5-003

(Issued November 7, 2012)

NORRIS, Commissioner, *dissenting*:

I continue to disagree with the Commission's decision to overturn the technical judgment of the North American Electric Reliability Corporation (NERC) Board of Trustees Compliance Committee and ReliabilityFirst in this matter. As I explained in my earlier dissent in this proceeding, my concern is not just that I do not find the Commission's reasoning as to the specific facts here compelling; I am also concerned about the potential long-term ramifications of the Commission's approach to this registry appeal for the Compliance Registry program.³⁴ The configuration of the United States Department of Energy, Portsmouth/Paducah Project Office (DOE Portsmouth) presented unique facts and left NERC with a difficult technical judgment call as to whether DOE Portsmouth should be registered as a load-serving entity. For the reasons I explained in my earlier dissent, in such circumstances I believe it is inappropriate to conduct a broad *de novo*-type review like the Commission pursued here, and in the absence of a more compelling rationale, to substitute the Commission's judgment for that of NERC.³⁵

Accordingly, I respectfully dissent.

John R. Norris, Commissioner

³⁴ *U.S. Department of Energy, Portsmouth/Paducah Project Office*, 139 FERC ¶ 61,054 (2012), Norris, *dissenting* at 1.

³⁵ *Id.* at 3-4.