

145 FERC ¶ 61,202
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Western Electricity Coordinating Council
North American Electric Reliability Corporation
Western Electricity Coordinating Council

Docket Nos. EL13-52-001
RR13-10-000
RR13-12-000
(not consolidated)

ORDER ON REHEARING, INDEPENDENT RELIABILITY COORDINATOR
FOR WESTERN INTERCONNECTION FILINGS, AND
DIRECTING COMPLIANCE FILINGS

(Issued December 6, 2013)

1. This order addresses three filings concerning the Western Electricity Coordinating Council's (WECC's) proposal to establish an independent reliability coordinator for the Western Interconnection (known as Peak Reliability) that would be funded under section 215 of the Federal Power Act (FPA).¹ First, Edison Electric Institute (EEI) requests rehearing of the June 20, 2013 Declaratory Order in Docket No. EL13-52-001, which conditionally approved FPA section 215 funding for Peak Reliability.² Second, the North American Electric Reliability Corporation (NERC) seeks approval of proposed amendments to the NERC-WECC Delegation Agreement, which includes revisions to WECC's bylaws. Third, WECC petitions for approval of the Peak Reliability governance documents.

2. In this order, we deny EEI's request for rehearing of the Declaratory Order. As discussed below, we conditionally accept the Peak Reliability governance documents and allow FPA section 215 funding. Specifically, WECC's initial petition and the

¹ 16 U.S.C. § 824o (2012). Peak Reliability, formerly referred to as RC Company, would also perform the interchange authority function currently performed by WECC using the WECC Interchange Tool.

² *Western Electricity Coordinating Council*, 143 FERC ¶ 61,239 (2013) (Declaratory Order).

Declaratory Order tied funding to WECC sub-delegating authority to Peak Reliability. In WECC's Peak Reliability governance documents filing, however, it is unclear whether WECC is still proposing a sub-delegation structure. Therefore, we accept the Peak Reliability governance documents and allow FPA section 215 funding pursuant to the Declaratory Order if WECC clarifies that WECC is implementing the bifurcation via a sub-delegation structure as described in WECC's initial petition and approved in the Declaratory Order. We direct that, within 30 days of the date of this order, WECC inform us of its intent and, if it is using a sub-delegation structure, submit revised Peak Reliability governance documents that clearly indicate that WECC is sub-delegating its reliability coordinator authority to Peak Reliability. We also conditionally accept the amended NERC-WECC Delegation Agreement in Docket No. RR13-10-000 subject to the condition that NERC maintain the language that NERC proposes to remove in section 1 of Exhibit E (Funding).³ NERC is directed to submit a compliance filing within 30 days of the date of this order that would maintain the language in section 1 of Exhibit E of the amended NERC-WECC Delegation Agreement.

3. If WECC no longer intends to make a sub-delegation to Peak Reliability as previously proposed, WECC should also inform the Commission in its compliance filing. In that event, if WECC wants to fund the bifurcation via FPA section 215, WECC must seek Commission approval for the changed proposal in an appropriate filing.

I. Background

4. On August 23, 2006, NERC filed its proposed 2007 business plan and budget and the proposed 2007 business plans and budgets for eight anticipated Regional Entities, including WECC. The Commission conditionally accepted NERC's proposed business plan and budget and accepted in part the Regional Entity budgets.⁴ With respect to WECC, the Commission determined that the WECC reliability coordinator function could not be funded under FPA section 215 because the WECC reliability coordinator

³ We recognize that, in maintaining the deleted language in section 1 of Exhibit E, section 1 may need to be modified elsewhere to indicate that the costs associated with the deleted language need not be included in WECC's annual budget submission to NERC.

⁴ *North American Electric Reliability Corp.*, 117 FERC ¶ 61,091, at P 3 (2006) (October 24, 2006 Order), *order on reh'g*, 118 FERC ¶ 61,111 (2007) (February 15, 2007 Order), *order on reh'g*, 119 FERC ¶ 61,059 (2007) (April 19, 2007 Order). In the October 24, 2006 Order, the Commission reserved judgment on the Regional Entity business plans and budgets because the delegation agreements between NERC and the Regional Entities had yet to be executed or filed with the Commission for approval. October 24, 2006 Order, 117 FERC ¶ 61,091 at P 5.

engaged in real-time operation of the Bulk-Power System.⁵ The Commission also stated that “[u]nless there is a strong separation between oversight and real-time operations, the same entity should not oversee its own compliance with reliability standards.”⁶ Accordingly, the Commission excluded \$6.9 million of WECC’s proposed budget for the reliability coordinator function from funding under FPA section 215.

5. WECC, Pacific Gas and Electric Company, and Southern California Edison Company jointly sought rehearing of the Commission’s determination regarding funding of the WECC reliability coordinator. On February 15, 2007, in an order on rehearing, the Commission directed its staff to hold a technical conference to discuss the issues raised in WECC’s request for rehearing concerning the funding of WECC’s reliability coordinator activities. The Commission stated that it would issue an order following the technical conference.⁷

6. On April 19, 2007, the Commission issued an order on rehearing addressing whether the WECC reliability coordinator function was eligible for funding under FPA section 215. The Commission determined that the WECC reliability coordinator function could be funded under FPA section 215, stating that:

The Commission agrees that all of the load serving entities within WECC’s geographic boundaries should pay their allocated share of WECC’s reliability coordinator costs . . . based on the net energy for load and that there should not be any “free riders,” since in this proceeding, the Commission is granting rehearing and finds that WECC’s reliability coordinator function should be a statutory activity pursuant to section 215 of the FPA.⁸

⁵ A reliability coordinator is “[t]he entity that is the highest level of authority who is responsible for the reliable operation of the Bulk Electric System, has the Wide Area view of the Bulk Electric System, and has the operating tools, processes and procedures, including the authority to prevent or mitigate emergency operating situations in both next-day analysis and real-time operations” North American Electric Reliability Corporation (NERC) Definitions Used in the Rules of Procedure, Appendix 2 to the NERC Rules of Procedure, at 17 (effective March 5, 2013).

⁶ October 24, 2006 Order, 117 FERC ¶ 61,091 at P 52.

⁷ February 15, 2007 Order, 118 FERC ¶ 61,111 at P 1. The technical conference was held on March 2, 2007.

⁸ April 19, 2007 Order, 119 FERC ¶ 61,059 at P 44.

7. While the Commission did not adopt a general policy regarding FPA section 215 funding of reliability coordinators, the April 19, 2007 Order determined that WECC's reliability coordinator function was a statutory activity based on the circumstances specific to WECC.⁹ The Commission determined that WECC addressed the concerns discussed in the October 24, 2006 Order. The Commission noted WECC's position that, while "legally' operators of the Bulk-Power System . . . the WECC reliability coordinators do not physically operate grid facilities. Rather, they advise and, when necessary, direct other entities such as balancing authorities and transmission operators to take operational actions."¹⁰ In concluding that the WECC reliability coordinator function was eligible for FPA section 215 funding, the Commission found that "[t]here is no dispute that WECC's reliability coordinators are focused on wide-area situational awareness and wide-area operations oversight."¹¹ The Commission also noted that WECC proposed to have NERC lead the compliance audit team of the WECC reliability coordinator function. However, in the April 19, 2007 Order, the Commission stated that it would address WECC's proposal, and the issue of compliance and enforcement oversight of the WECC reliability coordinator generally, in a separate order on the proposed delegation agreement between NERC and WECC.

8. On November 29, 2006, NERC submitted unexecuted delegation agreements between NERC and eight proposed Regional Entities, including WECC. On April 19, 2007, the Commission accepted the WECC delegation agreement.¹² Exhibit E of the NERC-WECC Delegation Agreement stated that the "WECC activities that will be funded through the ERO funding mechanism [include] . . . Situational Awareness and Infrastructure Security[:]. This category includes WECC's Reliability Coordinator Functions."¹³ The Commission observed that, according to the delegation agreement, WECC would act as a reliability coordinator and that:

⁹ *Id.* PP 21, 24.

¹⁰ *Id.* P 23.

¹¹ *Id.* P 24.

¹² *North American Electric Reliability Council and North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007) (Initial Delegation Agreement Order), *order on reh'g*, 120 FERC ¶ 61,260 (2007).

¹³ *North American Electric Reliability Corp.*, Petition, Docket No. RR07-7-000, at Attachment 7 (Delegation Agreement Between NERC and Western Electricity Coordinating Council), Exhibit E at 1 (filed Nov. 29, 2006); *see also* Initial Delegation Agreement Order, 119 FERC ¶ 61,060 at P 517 n.257 ("With respect to situational

(continued...)

WECC, as a reliability coordinator, is a user, owner, or operator of the Bulk-Power System. As such, WECC is obligated to demonstrate a strong separation between oversight and operational functions.¹⁴

9. The Commission expressed concern with the level of independence between the WECC reliability coordinator and the WECC Regional Entity compliance and enforcement functions. The Commission determined that “WECC’s compliance staff is not sufficiently separated from its reliability coordinators . . . [because] WECC’s compliance staff and reliability coordinators are hired and have their performance reviewed by WECC management, and both have their work product reviewed by the same member committees and management personnel.”¹⁵ The Commission directed NERC and WECC to remedy these deficiencies and stated that, “[i]f it chooses, and NERC agrees, WECC may engage NERC to oversee the compliance and enforcement functions as they relate to WECC’s compliance with reliability standards.”¹⁶

10. In response to the Commission’s directive, WECC entered into agreements, first with NERC, and then with Northeast Power Coordinating Council (NPCC), another Regional Entity, to perform compliance and enforcement activities with respect to WECC’s reliability coordinator and interchange authority functions. The Commission approved these agreements.¹⁷ WECC’s agreement with NPCC remains in effect.

11. On March 12, 2013, WECC filed a petition for declaratory order regarding WECC’s plan to establish a separate, independent company to perform the reliability coordinator function in the Western Interconnection. WECC sought confirmation that the new company, then referred to as RC Company, could continue to fund the reliability coordinator and WECC Interchange Tool functions under FPA section 215. WECC also

awareness and infrastructure security, section 1 provides that this function will include WECC’s reliability coordinator functions.”).

¹⁴ Initial Delegation Agreement Order, 119 FERC ¶ 61,060 at PP 227, 453.

¹⁵ *Id.* P 456.

¹⁶ *Id.* The Commission stated that “[t]his is just one possible way to help establish the strong separation that we require.” *Id.*

¹⁷ *North American Electric Reliability Corp.*, Docket Nos. RR06-1-018, *et al.* (Feb. 17, 2009) (delegated letter order); *North American Electric Reliability Corp.*, Docket No. RR11-2-000 (Nov. 15, 2011) (delegated letter order).

sought confirmation that, after transferring the reliability coordinator function to RC Company, WECC would not be precluded from undertaking compliance and enforcement actions with respect to RC Company. WECC stated that “the Commission already has determined, based on the factors cited above, that the [reliability coordinator] in WECC may be funded under Section 215. The fact that WECC will delegate these functions to RC Company does not affect the Commission’s conclusions that these functions are appropriately funded through Section 215.”¹⁸

12. In its petition for declaratory order, WECC explained that it would accomplish its new structure by sub-delegating the reliability coordinator function from WECC to the new company. For example, in pleadings, WECC described its proposed transaction as a sub-delegation of reliability function authority to the RC Company that NERC had delegated to WECC. WECC succinctly described the structure as follows:

WECC disagrees with those commenters that claim that RC Company cannot be funded under Section 215 because it is neither the ERO nor a Regional Entity. As before, NERC will delegate situational awareness activities, including ensuring that the RC functions are performed on an Interconnection-wide basis by a single RC, to WECC, a Regional Entity. The only difference [resulting from WECC’s proposal] is that WECC will delegate these same statutory activities to RC Company as permitted under its delegation agreement with NERC.¹⁹

13. On June 20, 2013, the Commission issued the Declaratory Order conditionally approving WECC’s proposed plan to establish an independent reliability coordinator company to perform the reliability coordinator function that WECC had performed since 2007. Based on representations contained in WECC’s petition for declaratory order, the Commission held that the RC Company could be funded under FPA section 215:

WECC currently receives funding for its reliability coordinator activities under FPA section 215 pursuant to the [April 19, 2007 Order]. The [April 19, 2007 Order] held that the reliability coordinator function in the Western Interconnection is a FPA section

¹⁸ WECC Petition for Declaratory Order at 18.

¹⁹ Western Electricity Coordinating Council, Motion, Docket No. EL13-52-000 (filed Apr. 26, 2013) and accepted for filing in the Declaratory Order. In its pleading, WECC cited to section 10 of the NERC-WECC Delegation Agreement for support that WECC, with NERC’s approval, could sub-delegate functions to others. *Id.* at 10.

215 activity, and therefore the function is eligible for FPA section 215 funding. WECC states it will transfer its reliability coordinator functions to RC Company by a sub-delegation agreement and RC Company will perform reliability coordinator functions for the Western Interconnection.

Based on the record, we are not persuaded by commenters' argument that RC Company is not eligible for FPA section 215 funding because RC Company would not be the [Electric Reliability Organization (ERO)] or a Regional Entity. We conclude that having RC Company perform the reliability coordinator function in WECC pursuant to a sub-delegation agreement between WECC and RC Company does not materially change the factual basis for the Commission's determination pursuant to FPA section 215 funding for the WECC reliability coordinator in the April 19, 2007 Order.²⁰

14. The Commission conditioned its approval of WECC's petition for declaratory order on the submission of necessary governance documents and stated that its approval was "based on the facts presented and any material change to the facts may change the conditional approval granted herein."²¹

II. Filings

A. Request for Rehearing (Docket No. EL13-52-001)

15. On July 22, 2013, EEI requested rehearing of the Declaratory Order based on the following alleged errors:

Peak Reliability is not eligible for FPA section 215 funding because it is not the ERO or a Regional Entity;

the ERO cannot delegate statutory activities to non-Regional Entities under FPA section 215 and Regional Entities cannot sub-delegate statutory activities to an entity other than another Regional Entity under the NERC Rules of Procedure;

reliability coordination is not an FPA section 215 statutory activity or an

²⁰ Declaratory Order, 143 FERC ¶ 61,239 at PP 40-41.

²¹ *Id.* Ordering Paragraph.

approved NERC statutory criterion because it involves day-to-day operational control of the Bulk-Power System; and

the Commission cannot defer to the advice of the Western Interconnection Regional Advisory Body (WIRAB) on the issue of Peak Reliability funding.

16. EEI maintains that FPA section 215 and Commission regulations and precedent only allow the ERO and Regional Entities to be funded under FPA section 215, i.e., that only the ERO and Regional Entities can perform a “statutory” activity. Specifically, EEI states that: (1) FPA section 215(c)(2)(B) provides for funding of the ERO while FPA section 215(e)(4) makes Regional Entities eligible for statutory funding; (2) 18 C.F.R. § 39.4 only directs the ERO to file ERO and Regional Entity budgets with the Commission for approval; and (3) Order No. 672 states that “[a]ny funding that is approved and provided by the ERO to a Regional Entity would be limited to a Regional Entity’s costs related to the delegated functions.”²² EEI distinguishes the April 19, 2007 Order, where the Commission determined that WECC’s reliability coordinator function was statutory, by stating that the April 19, 2007 Order was premised on the WECC Regional Entity carrying out the reliability coordinator function, which would no longer be the case once Peak Reliability assumes that responsibility.

17. EEI argues that the ERO and Regional Entities are not permitted to delegate statutory responsibilities to non-Regional Entities. EEI states that FPA section 215(e)(4) only permits delegation from the ERO to a Regional Entity for the purpose of proposing and enforcing Reliability Standards and that no authority exists for delegating or sub-delegating a statutory function to a non-Regional Entity. EEI also cites to Rule 1205 of the NERC Rules of Procedure, arguing that it prohibits sub-delegation to non-Regional Entities.²³ EEI states that, although the Commission has allowed Regional Entities to use

²² *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 228 (2006), *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

²³ Rule 1205, entitled “Sub-Delegation,” states:

The Regional Entity shall not sub-delegate any responsibilities and authorities delegated to it by its regional delegation agreement with NERC except with the approval of NERC and FERC and other Applicable Governmental Authorities. Responsibilities and authorities may only be sub-delegated to another Regional Entity.

contractors and consultants, in those situations, the Regional Entity bears ultimate responsibility. EEI states that, because WECC intends to sub-delegate the reliability coordinator function to Peak Reliability, WECC will no longer bear ultimate responsibility.

18. EEI further argues that sub-delegation without ERO or Regional Entity oversight is inconsistent with the requirements for oversight of delegated statutory functions. EEI states that the Regional Entities' performance is regularly assessed by NERC under the Commission's regulations, precedent, NERC Rules of Procedure, and the Regional Entity delegation agreements. EEI states that Peak Reliability's performance of the reliability coordinator function would not be assessed by NERC or WECC under WECC's proposal.

19. EEI contends that the reliability coordinator function is not a statutory activity. EEI acknowledges that the Commission found that the reliability coordinator function is part of WECC's situational awareness role and appears in the NERC-WECC Delegation Agreement, but EEI states that WECC will no longer perform the reliability coordinator function after Peak Reliability assumes that function. EEI notes that WECC will continue to conduct its own situational awareness activities after Peak Reliability is established, while Peak Reliability will perform the functions of a registered entity (i.e., reliability coordinator). EEI further states that the reliability coordinator function is not statutory according to the NERC statutory criteria because those criteria exclude "[a]ctivities entailing Real-time operational control of the Bulk Power System."²⁴

20. EEI states that the Declaratory Order did not address EEI's assertion that the reliability coordinator function in WECC (regardless of the actor) is necessarily involved in day-to-day operational decisions and is therefore non-statutory. EEI states that reliability coordinators are "by definition" involved in day-to-day operations because users, owners, and operators of the Bulk-Power System are obligated to comply with their directions. EEI identifies several Reliability Standards that EEI maintains evidences the reliability coordinators' key role in day-to-day operational decisions. EEI also cites WECC's petition for declaratory order, WECC reliability coordinator's compliance history, the findings in a September 8, 2011 Outage Report, Peak Reliability's proposed bylaws, and WECC's hiring plans as proof that the reliability coordinator has real-time operational decision-making authority.²⁵

²⁴ North American Electric Reliability Corp., Petition, Docket No. FA11-21-000, at 38 (filed Feb. 1, 2013).

²⁵ EEI Rehearing Request at 25-30.

21. EEI claims that deferring to WIRAB on the issue of Peak Reliability funding was improper because FPA section 215(j) does not list reliability coordinator funding as a topic on which Regional Advisory Boards should be given deference.

B. Amended NERC-WECC Delegation Agreement (Docket No. RR13-10-000)

22. On August 26, 2013, NERC filed an amended NERC-WECC Delegation Agreement. The amended NERC-WECC Delegation Agreement includes, as an attachment, revisions to the WECC bylaws. NERC states that the principal purpose of the filing is to revise various sections and exhibits in the NERC-WECC Delegation Agreement to implement WECC's decision to completely separate its compliance monitoring and enforcement function from the reliability coordinator and interchange authority functions for the Western Interconnection.

23. Among these changes, NERC proposes to delete "WECC's Reliability Coordinator Functions, Western Interconnection Synchrophasor Program, WECC Interchange Tool, and all necessary supporting activities" from the "[s]cope of activities funded through the ERO funding mechanism." NERC explains that it proposes to delete this language from Exhibit E to the NERC-WECC Delegation Agreement "to eliminate RC-related activities previously included under the Situation Awareness activities heading ... because effective January 1, 2014, WECC will no longer include RC-related activities in its Business Plan and Budget."²⁶ NERC also states that several revisions were made to the WECC bylaws "to better enable WECC to perform as a Regional Entity and member organization."²⁷ Proposed revisions to the WECC bylaws include a change in WECC governance from a hybrid board of thirty-three directors, composed of a combination of member-representatives and independent directors, to a fully independent board of nine directors. The proposed revisions also make several changes to WECC's membership classes and establish a Member Advisory Committee to provide stakeholder input to the board.

C. Peak Reliability Governance Documents (Docket No. RR13-12-000)

24. On September 20, 2013, WECC filed proposed Peak Reliability governance documents, which consist of the Peak Reliability bylaws; a Reliability Coordinator and Interchange Authority Agreement between WECC and Peak Reliability (RC Agreement);

²⁶ NERC Amended NERC-WECC Delegation Agreement Petition at 20.

²⁷ *Id.* at 1-2.

and a termination agreement between WECC and NPCC (Termination Agreement).²⁸ WECC states that the Termination Agreement is only a draft and has not yet been finalized. WECC states that Peak Reliability will be established as a not-for-profit company governed by a seven-member independent board of directors elected by Peak Reliability members. WECC explains that Peak Reliability membership is divided into five classes of membership, with a sixth, not-voting “Associate Members” class. WECC further explains that Peak Reliability will have a Member Advisory Committee drawn from the five voting membership classes.

25. WECC asserts that the proposed Peak Reliability governance documents are consistent in all material respects with the proposal in WECC’s petition for declaratory order. WECC states that the governance documents “transfer all of [WECC’s] current RC functions to Peak Reliability, memorializing this transfer in an agreement between the parties.”²⁹ WECC explains that the RC Agreement provides that, after the effective date of the RC Agreement, Peak Reliability will assume sole responsibility and liability for the reliability coordinator functions in the Western Interconnection. WECC states that the RC Agreement permits WECC or Peak Reliability to initiate termination of the RC Agreement under certain circumstances subject to Commission approval. WECC maintains that Peak Reliability will provide real-time, wide-area situational awareness and oversight, but that Peak Reliability will not control real-time operations and will not have electronic or physical equipment or systems that would allow it to operate any bulk electric system device.

III. Notices and Responsive Pleadings

A. Docket No. EL13-52-001

26. On August 6, 2013, WECC filed a motion for leave to answer and an answer to EEI’s request for rehearing. On August 7, 2013 WIRAB also filed a motion for leave to answer and an answer to EEI’s request for rehearing.

B. Docket No. RR13-10-000

27. Notice of NERC’s petition to amend the NERC-WECC Delegation Agreement was published in the *Federal Register*, 78 Fed. Reg. 54,462 (2013), with interventions

²⁸ See Peak Reliability Governance Documents Petition, Docket No. RR13-12-000, at 12 and Attachments A (Peak Reliability bylaws), B (RC Agreement), and C (Termination Agreement).

²⁹ Peak Reliability Governance Documents Petition at 10.

and protests due on or before September 16, 2013. Motions to intervene were timely filed by WECC and Modesto Irrigation District (Modesto). A motion to intervene and comment was timely filed by EEI. Avista Corporation (Avista) moved to intervene out-of-time.

28. EEI states that it does not object to the proposed amendments to the NERC-WECC Delegation Agreement to the extent necessary to effectuate the bifurcation of WECC. However, EEI states that Exhibit E to the amended NERC-WECC Delegation Agreement, which provides for WECC to collect assessments on behalf of Peak Reliability, as well as any other provisions of the amended NERC-WECC Delegation Agreement that relate to the funding of Peak Reliability under FPA section 215, must be revised and submitted for approval by the Commission if the Commission grants EEI's request for rehearing in Docket No. EL13-52-001.

C. Docket No. RR13-12-000

29. Notice of WECC's Peak Reliability governance documents submission was published in the *Federal Register*, 78 Fed. Reg. 60,270 (2013), with interventions and protests due on or before October 11, 2013. Motions to intervene were timely filed by NPCC, Modesto, Puget Sound Energy, Inc., and California Department of Water Resources State Water Project. Motions to intervene and comments were timely filed by NERC, Avista, and EEI. EEI also filed a motion to consolidate Docket Nos. EL13-52-001 and RR13-12-000, which Avista supports. WECC filed a motion for leave to answer and an answer to the comments submitted by EEI.

30. NERC states that it supports WECC's decision to bifurcate. NERC states that the Commission should confirm WECC's request that WECC not be precluded from undertaking compliance and enforcement actions with respect to Peak Reliability, once the bifurcation is complete.

31. EEI and Avista each incorporate by reference the comments they submitted separately in response to WECC's petition for declaratory order, and that EEI incorporates by reference in its rehearing request. EEI states that it supports WECC's bifurcation and that Peak Reliability needs stable and adequate funding. However, EEI contends that Peak Reliability is not eligible for funding under FPA section 215. EEI asserts that, if the Commission grants rehearing of the Declaratory Order, the provisions of the Peak Reliability bylaws and RC Agreement that provide for FPA section 215 funding must be revised. EEI and Avista also observe that, under WECC's proposal, WECC will assume compliance monitoring and enforcement responsibilities with regard to Reliability Standard violations that occur prior to the effective date of the RC Agreement (i.e., when WECC reliability coordinator was the reliability coordinator). EEI and Avista question whether these provisions are consistent with the requirements of the Declaratory Order regarding the independence of compliance and enforcement from registered entity functions.

IV. Discussion

A. Procedural Matters

1. Docket No. EL13-52-001

32. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2013), prohibits answers to a request for rehearing. Therefore, we reject WECC and WIRAB's answers.

2. Docket No. RR13-10-000

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

34. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), the Commission will grant Avista's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

3. Docket No. RR13-12-000

35. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

36. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept WECC's answer because it provided information that assisted us in our decision-making process.

B. Substantive Issues

37. For the reasons discussed below, we deny EEI's request for rehearing of the Declaratory Order. In addition, as discussed below, we conditionally accept the proposed amended NERC-WECC Delegation Agreement and Peak Reliability governance documents and, as explained herein, direct WECC and NERC to submit compliance filings within 30 days of the date of this order.

1. EEI Request for Rehearing

38. We deny EEI's request for rehearing of the Declaratory Order. EEI's principal arguments on rehearing are: (1) that the WECC reliability coordinator function is not a statutory function; and (2) even if statutory, Peak Reliability cannot perform the

reliability coordinator function using statutory funds because it is not the ERO or a Regional Entity.

39. The Declaratory Order determined that the factual and legal basis for allowing statutory funding for the reliability coordinator function in WECC had not materially changed since the April 19, 2007 Order.³⁰ The Declaratory Order, based on the Commission's determination in the April 19, 2007 Order, concluded that the reliability coordinator function in WECC is a statutory function.³¹ In addition, the Declaratory Order determined that Peak Reliability could receive statutory funds to perform that function pursuant to a sub-delegation of authority from WECC.³² EEI asserts, in essence, that the Commission erred: (1) in concluding that a non-ERO, non-Regional Entity could perform a statutory function; and (2) in finding that the factual basis for the April 19, 2007 Order's conclusion, that the WECC reliability coordinator is eligible for statutory funding, has not changed or will not change once WECC transfers that function to Peak Reliability.

40. We affirm that Peak Reliability would be eligible for FPA section 215 funding based on the conditions set forth in the Declaratory Order (i.e., WECC sub-delegates the reliability coordinator function to Peak Reliability). EEI argues that Peak Reliability cannot receive statutory funds to perform that function because Peak Reliability is not the ERO or a Regional Entity, and it cannot receive statutory funding to perform the duties of a registered entity. The Declaratory Order addressed EEI's argument by concluding that having Peak Reliability carry out the reliability coordinator function pursuant to a sub-delegation agreement "does not materially change the factual basis for the Commission's determination to permit FPA section 215 funding for the WECC reliability coordinator [in the April 19, 2007 Order]."³³ In addition, the sub-delegation relationship as WECC proposed adequately ensures that there is a connection from the ERO, to the Regional Entity and then to new Peak Reliability to maintain FPA section 215 funding consistent with the April 19, 2007 Order. Further, nothing in FPA section 215(e)(4) or Part 39 of the Commission's regulations prohibits a sub-delegation as WECC proposed and the Commission accepted in the Declaratory Order.

³⁰ Declaratory Order, 143 FERC ¶ 61,239 at PP 40-41 (citing April 19, 2007 Order, 119 FERC ¶ 61,059 at P 24).

³¹ Declaratory Order, 143 FERC ¶ 61,239 at P 41.

³² *Id.*

³³ *Id.*

41. On rehearing, EEI argues that sub-delegation is not permitted under Rule 1205 of the NERC Rules of Procedure and the discussion of Rule 1205 in the NERC Certification Order, although EEI notes that “Regional Entities could use sub-contractors and consultants.”³⁴ We do not believe Rule 1205 is necessarily an impediment to the sub-delegation structure. Section 100 of the NERC Rules of Procedure affords NERC flexibility in how NERC addresses compliance with its rules.³⁵ In addition, section 10 of the NERC-WECC Delegation Agreement indicates that WECC may sub-delegate an activity with NERC’s express consent and without mention of other limitations.³⁶ Further, NERC indicated in response to WECC’s petition for declaratory order that it supports the establishment of Peak Reliability and nowhere stated that Rule 1205 would be an impediment to a sub-delegation agreement between WECC and Peak Reliability, which was integral to WECC’s proposal. Accordingly, the Commission concludes that Rule 1205 could be waived.³⁷ NERC and WECC should indicate in their compliance filings whether they intended to seek such a waiver.

³⁴ EEI Rehearing Request at 17 (citing *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, at P 586, *order on reh’g & compliance*, 117 FERC ¶ 61,126 (2006), *aff’d sub nom. Alcoa, Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009)). It appears that EEI is raising this issue for the first time in its rehearing request. Although the Commission looks with disfavor on parties raising issues for the first time on rehearing because the practice is disruptive to our administrative process and denies parties the opportunity to respond, *see, e.g., Primary Power, LLC v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,204, at P 20 (2013), we nonetheless address the substance of EEI’s argument.

³⁵ Section 100 of the NERC Rules of Procedure states: “Any entity that is unable to comply or that is not in compliance with a NERC Rule of Procedure shall immediately notify NERC in writing, stating the Rule of Procedure of concern and the reason for not being able to comply with the Rule of Procedure. NERC shall evaluate each case and inform the entity of the results of the evaluation. If NERC determines that a Rule of Procedure has been violated, or cannot practically be complied with, NERC shall notify the Applicable Governmental Authorities and take such other actions as NERC deems appropriate to address the situation.” NERC Rules of Procedure, Section 100 (effective October 4, 2013).

³⁶ NERC-WECC Delegation Agreement, Section 10 (“WECC may not delegate in whole or in part its Delegated Authority to any other entity without NERC’s express consent.”).

³⁷ *See, e.g., North American Electric Reliability Corp., Petition*, Docket No. RC11-6-000, at 2 (filed Sept. 30, 2011) (“NERC believes this new approach is fully consistent

(continued...)

42. On rehearing, EEI also argues that Peak Reliability would not be subject to oversight by NERC or WECC. We reject this argument because, as noted in the Declaratory Order, WECC, subject to NERC and Commission approval, would have the residual authority to terminate the sub-delegation agreement with Peak Reliability.³⁸ In addition, pursuant to the NERC Rules of Procedure, Peak Reliability would have to maintain NERC certification as a reliability coordinator.³⁹ Accordingly, while independent of WECC as discussed above, Peak Reliability would still ultimately be subject to Commission and NERC oversight.

43. We affirm the conclusion in the Declaratory Order that the factual basis for allowing statutory funding for the WECC reliability coordinator, as discussed in the April 19, 2007 Order, still exists and would continue to exist after that function is sub-delegated to Peak Reliability.⁴⁰ The April 19, 2007 Order determined that WECC addressed the Commission's concerns regarding whether the reliability coordinator in the Western Interconnection was involved in real-time operations of the Bulk-Power System.⁴¹ We are not persuaded by EEI's claim that the factual basis for the April 19, 2007 Order's conclusion has changed. EEI argues that the reliability coordinator, by

with NERC's existing rules and authority and the Commission's rules, orders and regulations; however, to the extent the Commission believes otherwise, NERC requests waiver of such rules, regulations and orders to put this new initiative and associated reporting tools in place starting now.”).

³⁸ Declaratory Order, 143 FERC ¶ 61,239 at P 15.

³⁹ NERC Rules of Procedure, Section 501.2 (“NERC shall provide for Certification of all entities with primary reliability responsibilities requiring Certification ...The NERC programs shall: [] Evaluate and certify the competency of entities performing reliability functions. The entities presently expected to be certified include Reliability Coordinators, Transmission Operators, and Balancing Authorities.”).

⁴⁰ Declaratory Order, 143 FERC ¶ 61,239 at P 41. Although EEI's rehearing request now criticizes the Declaratory Order, we note that in the April 19, 2007 Order proceeding, EEI submitted comments supporting statutory funding for the WECC reliability coordinator. EEI, Motion to Intervene and Comments, Docket No. RR06-03-000, at 4 (filed Sept. 13, 2006).

⁴¹ April 19, 2007 Order, 119 FERC ¶ 61,059 at P 24.

definition, has day-to-day operational control under the NERC Functional Model.⁴² EEI also claims that this operational control is reflected in the Reliability Standards. We disagree with EEI that there has been a change in material facts from the April 19, 2007 Order. The April 19, 2007 Order recognized the functional role of the reliability coordinator in determining that the WECC reliability coordinator could receive statutory funding.⁴³ Moreover, the April 19, 2007 Order explicitly recognized that reliability coordinators are subject to Reliability Standards. We agree with WECC that reliability coordinator oversight of the Bulk-Power System is designed to ensure that Reliability Standards are not violated, including the authority to prevent or mitigate emergency operating situations, and reliability coordinators only direct operators to take real-time action in furtherance of that goal. By contrast, balancing authorities and transmission operators exercise real-time control of the Bulk-Power System.⁴⁴ As the Commission stated in the April 19, 2007 Order, we believe the difference in those roles from the role of a reliability coordinator to be significant.⁴⁵

44. The other materials cited by EEI (e.g., WECC's declaratory order petition and WECC reliability coordinator's compliance history) do not establish that the WECC reliability coordinator exercises day-to-day operational control of the Bulk-Power System. Instead, these materials merely show that the WECC reliability coordinator has been carrying out the reliability coordinator function (e.g., by establishing system operating limits, running studies, monitoring the Western Interconnection, and issuing directives to balancing authorities and transmission operators only when appropriate). Moreover, the fact that the WECC reliability coordinator has taken on or plans to take on more staff and better equipment does not prove that the reliability coordinator function in WECC is expanding to include day-to-day operational control.

⁴² EEI Rehearing Request at 22 (“Reliability Coordinators such as the WECC Reliability Coordinator and the future RC Company are Registered Entities and therefore, by definition, involved in operating decisions for the bulk-power system.”).

⁴³ April 19, 2007 Order, 119 FERC ¶ 61,059 at P 4, n.5.

⁴⁴ Concluding that the reliability coordinator in WECC does not exercise real-time operational control also addresses EEI's argument based on the NERC statutory criteria. *See also North American Electric Reliability Corp.*, 143 FERC ¶ 61,052, at P 28 n.33 (2013) (“This order does not address any activities of the Regional Entities that the Commission has specifically approved as FPA section 215 activities.”).

⁴⁵ April 19, 2007 Order, 119 FERC ¶ 61,059 at PP 23-24.

45. Ultimately, we conclude that the functions that Peak Reliability would perform following sub-delegation of the reliability coordinator function would be no different than the functions that WECC, as the reliability coordinator, has been performing since 2007.

46. Finally, we reject EEI's assertion that it was improper to give deference to WIRAB on the issue of Peak Reliability funding because FPA section 215(j) does not afford Regional Advisory Bodies deference on such an issue. This argument is without merit because the April 19, 2007 Order gave WIRAB deference on substantially the same issue.⁴⁶ Moreover, deference to WIRAB is appropriate here because Peak Reliability funding implicates the following topics listed in FPA section 215(j) on which a Regional Advisory Body may give advice: "governance of an existing or proposed regional entity ... [and] whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest."⁴⁷ In addition, FPA section 215(j) allows for Regional Advisory Body advice on "any other responsibilities requested by the Commission." In any case, our determination in the Declaratory Order was not based solely on the advice provided by WIRAB.

47. For the foregoing reasons, the Commission denies EEI's request for rehearing.

2. Peak Reliability Governance Documents

48. We accept the Peak Reliability governance documents subject to the condition that, within 30 days of the date of this order, WECC inform us that its intent is to use a sub-delegation structure to implement the bifurcation as approved in the Declaratory Order and, if so, WECC submit a compliance filing within 30 days of the date of this order revising the Peak Reliability governance documents, and particularly the RC Agreement, to clarify that it is sub-delegating its reliability coordinator authority to Peak Reliability. The Declaratory Order and WECC's original proposal tied statutory funding to WECC sub-delegating authority to Peak Reliability, which NERC previously delegated to WECC,⁴⁸ and it is unclear whether WECC intended the governance

⁴⁶ *Id.* P 22 ("Therefore in this instance, the Commission gives deference to WIRAB's advice as a regional advisory body organized on an Interconnection-wide basis.").

⁴⁷ 16 U.S.C. § 824o(j).

⁴⁸ *See supra* P 12; *see also* WECC Petition for Declaratory Order at 13 ("WECC proposes to delegate all of its [reliability coordinator] and [WECC Interchange Tool] responsibilities to the RC Company and to enter into a delegation agreement with the RC Company memorializing this transfer of authority, under which the RC will assume all

(continued...)

documents to differ from the facts contained in the proposal WECC made in its petition for declaratory order. For example, the WECC petition accompanying the Peak Reliability governance documents and the RC Agreement make no mention of delegation or sub-delegation, terms that were frequently used in WECC's petition for declaratory order. WECC does not explain the purpose and intent of these differences and, rather, simply indicates that its filing contains no difference from its initial proposal.⁴⁹ In these circumstances, we require greater clarity to ensure that we are accepting the same transaction that was accepted in the Declaratory Order. Accordingly, we direct WECC to submit a compliance filing consistent with the discussion above.⁵⁰

49. EEI and Avista raise concerns that the RC Agreement and draft Termination Agreement create a situation in which WECC, acting as Compliance Enforcement Authority for Peak Reliability, would be responsible for addressing violations that occurred prior to the effective date of the RC Agreement, when WECC was acting as reliability coordinator, if the violations were unknown and unidentified before the effective date of the RC Agreement.⁵¹ We observe, however, that Section 7.3 of the RC Agreement protects WECC from any financial liability for violations that were not "known and identified" prior to the effective date of the RC Agreement. We find that this provision removes any financial conflict of interest that might prevent WECC from fulfilling its role as Compliance Enforcement Authority. However, a non-financial conflict of interest may still exist if WECC, acting as the Compliance Enforcement Authority, is permitted to judge the actions of WECC reliability coordinator prior to bifurcation. Accordingly, we direct WECC to address this non-financial conflict concern

responsibility and liability for the delegated functions effective on the later of January 1, 2014, or the effective date of the Commission order approving the delegation agreement.") and 18 ("The Commission already has determined, based on the factors cited above, that the RCs in WECC may be funded under Section 215[.] The fact that WECC will delegate these functions to RC Company does not affect the Commission's conclusions that these functions are appropriately funded through Section 215."); *see also* Declaratory Order, 143 FERC ¶ 61,239 at P 41.

⁴⁹ Peak Reliability Governance Documents Petition at 3, 10.

⁵⁰ To be clear, we are not directing WECC to sub-delegate if it no longer wants to do so. However, if WECC chooses to clarify that it is sub-delegating and revises the Peak Reliability governance documents accordingly, then it would be eligible for FPA section 215 funding pursuant to the Declaratory Order.

⁵¹ The draft Termination Agreement would terminate NPCC's current role as the Compliance Enforcement Authority over the WECC reliability coordinator.

in its compliance filing. In addition, WECC indicated that the Termination Agreement it submitted is only a draft. Thus, we direct WECC to submit a final version of the Termination Agreement for Commission review in the compliance filing.⁵²

50. With respect to NERC's proposal to delete language from section 1 of Exhibit E of the NERC-WECC delegation agreement, which effectively eliminates delegation of the reliability coordinator function to WECC, it is also not clear to us that NERC intended this result or its consequences for Peak Reliability's ability to collect statutory funds. For example, in its petition NERC made no mention of its intent to withhold the reliability coordinator authority from WECC; instead, it explained that it proposed to delete the relevant language "because effective January 1, 2014, WECC will no longer include RC-related activities in its Business Plan and Budget."⁵³ While NERC is correct as an administrative matter, this does not remove the necessity for a formal delegation of authority from NERC to WECC in order to make WECC's sub-delegation to Peak Reliability effective. Additionally, in its filing NERC continues to support bifurcation and makes no assertions that its proposed revisions are intended to prevent WECC from entering into a sub-delegation agreement with Peak Reliability. Accordingly, we accept NERC's filing subject to the condition that NERC submit a compliance filing within 30 days of the date of this order maintaining the language in section 1 of Exhibit E of the amended NERC-WECC Delegation Agreement that it proposes to delete.

51. Finally, we note that in the Declaratory Order, the Commission declined to limit Peak Reliability's statutory funding to a two-year transitional period.⁵⁴ However, section 13.3 of the proposed Peak Reliability bylaws requires Peak Reliability's Board of Directors to develop an alternative funding proposal after two years for member

⁵² If WECC's intent is no longer to use a sub-delegation structure, there may be other options for continuing FPA section 215 funding in the absence of a sub-delegation agreement. For example, under section 10 of the NERC-WECC Delegation Agreement, WECC may rely on Peak Reliability to operate as a contractor for WECC. If Peak Reliability operated as a contractor of WECC, WECC could not act as the Compliance Enforcement Authority for the reliability coordinator function in the Western Interconnections. *See* Initial Delegation Agreement Order, 119 FERC ¶ 61,060 at P 453.

⁵³ NERC Amended NERC-WECC Delegation Agreement Petition at 20.

⁵⁴ Declaratory Order, 143 FERC ¶ 61,239 at P 42.

consideration.⁵⁵ In accepting the Peak Reliability bylaws (assuming WECC elects to use the sub-delegation structure), we find that provision to be acceptable and will hold the Peak Reliability Board to that commitment. The findings in the Declaratory Order were based on the unique and specific facts provided in WECC's petition for declaratory order, which may change under the commitment.⁵⁶ Thus, notwithstanding the Declaratory Order, at that time we will require WECC and Peak Reliability to seek any necessary approvals for further funding of Peak Reliability beyond the second year of Peak Reliability beginning operations based on the facts then present.

52. On November 1, 2013, the Commission issued an order on the 2014 business plans and budgets of NERC, the Regional Entities, WIRAB, and Peak Reliability in Docket No. RR13-9-000. The Commission accepted the business plan and budget of Peak Reliability subject to the outcome of the dockets addressed in this order. While this order conditionally accepts the Peak Reliability governance documents and amended NERC-WECC Delegation Agreement, the Commission does not authorize the issuance of billing invoices to fund the fiscal 2014 operations of Peak Reliability until after the Commission issues an order on compliance in this proceeding. Recognizing that it may not be possible to resolve these issues by January 1, 2014, NERC and WECC should indicate in their compliance filings whether they intend to file a supplemental funding request to fund the existing WECC reliability coordinator function.

The Commission orders:

(A) EEI's request for rehearing of the Declaratory Order is denied, as discussed in the body of this order.

(B) The proposed Peak Reliability governance documents and amended NERC-WECC Delegation Agreement are conditionally accepted, as discussed in the body of this order.

⁵⁵ Peak Reliability Governance Documents Petition, Attachment A (Peak Reliability bylaws, Section 13.3) at 38 ("By the end of the second year after the Peak Reliability begins operation, the Board shall develop an alternative funding mechanism for consideration by the Members.").

⁵⁶ For example, WECC indicates that a future funding mechanism may be tariff based or based on Western Interconnection-wide bilateral contracts. Peak Reliability Governance Documents Petition at 7. In addition, the record indicates that parties are working to implement non-FPA section 215 funding for Peak Reliability in 2015 and later years. EEI Rehearing Request at 5.

(C) NERC and WECC are directed to submit compliance filings within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.