147 FERC ¶ 61,064
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability Corporation	Docket Nos.	RR13-10-002
Western Electricity Coordinating Council		RR13-12-002
		(not consolidated)

ORDER DENYING REHEARING

(Issued April 23, 2014)

1. On March 14, 2014, Edison Electric Institute (EEI) requested rehearing of the Commission's February 12, 2014 order accepting the compliance filings submitted by North American Electric Reliability Corporation (NERC) and Western Electricity Coordinating Council (WECC).[1] The compliance filings were submitted in response to the Commission's December 6, 2013 order conditionally accepting WECC's proposal to establish an independent reliability coordinator for the Western Interconnection (Peak Reliability).[2] For the reasons discussed in the body of this order, we deny EEI's request for rehearing.

I. Background

2. On June 20, 2013, the Commission issued a declaratory order approving conditionally WECC's plan to establish a new entity to perform the reliability coordinator and interchange authority functions in the Western Interconnection.[3] In its request for declaratory order, WECC proposed a sub-delegation of the reliability coordinator and

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[1] *North American Electric Reliability Corporation*, 146 FERC ¶ 61,092 (2014) (February 12 Order).

[2] *Western Electricity Coordinating Council*, 145 FERC ¶ 61,202 (2013) (December 6 Order).

[3] *Western Electricity Coordinating Council*, 143 FERC ¶ 61,239 (Declaratory Order), *reh'g denied*, 145 FERC ¶ 61,202 (2013), *appeal docketed sub nom. Edison Electric Institute v. FERC*, No. 14-1012 (D.C. Cir. Jan. 27, 2014).

interchange authority function from WECC to Peak Reliability. The Commission conditioned final approval of WECC's proposal on the submission of the necessary Peak Reliability governance documents.[4]

3. On August 26, 2013, NERC filed an amended delegation agreement between NERC and WECC (Amended NERC-WECC Delegation Agreement), which included proposed revisions to WECC's bylaws. On September 20, 2013, WECC filed documents addressing the formation of Peak Reliability. Specifically, WECC filed proposed Peak Reliability bylaws, a Reliability Coordinator and Interchange Authority Agreement between WECC and Peak Reliability (RC Agreement), and a draft Termination Agreement between WECC and Northeast Power Coordinating Council, Inc. (NPCC) (collectively, governance documents). WECC maintained that the governance documents were consistent with the Commission's Declaratory Order.

4. In the December 6 Order, the Commission accepted conditionally the proposed Peak Reliability governance documents and Amended NERC-WECC Delegation Agreement. In addition, the December 6 Order noted that section 13.3 of the Peak Reliability bylaws required Peak Reliability's Board of Directors to develop an alternative funding proposal after two years for member consideration and stated that the Commission would hold Peak Reliability to that commitment. The December 6 Order directed WECC to confirm that it intended to sub-delegate the reliability coordinator function to Peak Reliability, consistent with the Declaratory Order and, if so confirmed, directed WECC to submit revised Peak Reliability governance documents that clearly provide for sub-delegation. The Commission also directed WECC to address comments regarding WECC's assumption, as the Regional Entity, of the compliance enforcement authority over the reliability coordinator function. In addition, the December 6 Order directed WECC and NERC to indicate whether they sought waiver of Rule 1205 of the NERC Rules of Procedure, which prohibits the sub-delegation of responsibilities and authorities to non-Regional Entities. The December 6 Order also directed NERC to restore language in Exhibit E of the Amended NERC-WECC Delegation Agreement delegating the reliability coordinator function from NERC to WECC so that the function could, in turn, be sub-delegated from WECC to Peak Reliability. The December 6 Order further directed WECC to submit a final Termination Agreement between WECC and NPCC.[5]

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[4] EEI sought rehearing of the Declaratory Order on July 22, 2013. The Commission denied rehearing in the December 6 Order. *See* December 6 Order, 145 FERC ¶ 61,202 at PP 2, 38-47.

[5] No entity sought rehearing of the December 6 Order.

5. In its compliance filing, NERC confirmed that WECC would sub-delegate the reliability coordinator function to Peak Reliability and stated that "NERC intended to seek a waiver of the provision of § 1205 of the NERC Rules of Procedure."[6] Consistent with the December 6 Order, NERC submitted a revised version of the Amended NERC-WECC Delegation Agreement, restoring language in Exhibit E that NERC had previously proposed to delete.

6. In its compliance filing, WECC confirmed that "it intend[ed] to use a sub-delegation structure to implement the bifurcation of WECC and Peak Reliability and that it intend[ed] to sub-delegate its [reliability coordinator] functions to Peak Reliability."[7] WECC included a revised version of the RC Agreement that specifically referenced sub-delegation and thus "clearly reflect[ed] WECC's intent to sub-delegate its [reliability coordinator] activities to Peak Reliability."[8] Further, WECC requested "that the Commission, to the extent necessary, waive Rule 1205 to permit WECC to sub-delegate to Peak Reliability."[9] WECC also addressed commenters' concerns regarding potential non-financial conflicts arising from WECC, acting as the new compliance enforcement authority for the reliability coordinator function, potentially having to investigate actions of the WECC reliability coordinator that occurred prior to bifurcation. Lastly, WECC provided a final version of the Termination Agreement.

7. The February 12 Order determined that the compliance filings submitted by NERC and WECC satisfied the requirements in the December 6 Order. The February 12 Order found that WECC confirmed that it would sub-delegate the reliability coordinator function to Peak Reliability, WECC submitted a revised RC Agreement that explicitly reflected that structure, and WECC and NERC expressly sought waiver of Rule 1205 of the NERC Rules of Procedure to effectuate the sub-delegation.[10] The February 12 Order also found that NERC provided a revised version of the Amended NERC-WECC Delegation Agreement that restored the language in Exhibit E that, in the first instance, delegated the reliability coordinator function to WECC so that the reliability coordinator function could then be sub-delegated by WECC to Peak Reliability. With respect to the

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[6] NERC December 20, 2013 Compliance Filing at 1.

[7] WECC December 19, 2013 Compliance Filing at 3.

[8] *Id.*

[9] *Id.*

[10] WECC December 19, 2013 Compliance Filing at 3-4; NERC December 20, 2013 Compliance Filing at 4-5.

non-financial conflict issue, the February 12 Order found that WECC adequately addressed that concern. In addition, WECC submitted a final version of the Termination Agreement between WECC and NPCC.[11]

8. In response to EEI's protest of the NERC and WECC compliance filings, the February 12 Order determined that "the December 6 Order rejected almost all of the arguments in EEI's protest and that EEI's arguments are beyond the scope of the compliance filings."[12] The Commission explained in the February 12 Order that the December 6 Order affirmed that Peak Reliability would be eligible for funding under section 215 of the Federal Power Act (FPA)[13] based on the conditions in the Declaratory Order (i.e., WECC sub-delegates the reliability coordinator function to Peak Reliability).[14] In reaching that determination, the February 12 Order stated that the December 6 Order rejected EEI's arguments that Peak Reliability is ineligible to receive funding under FPA section 215 because it is not a Regional Entity or the Electric Reliability Organization (ERO) and that the reliability coordinator function is not a "statutory" function.[15] The February 12 Order also stated that the December 6 Order affirmed that the reliability coordinator in the Western Interconnection does not exercise day-to-day operational control of the Bulk-Power System and that Peak Reliability, while independent of WECC, would still ultimately be subject to Commission and NERC oversight.[16]

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[11] The February 12 Order directed WECC to submit executed copies of the RC Agreement and Termination Agreement and NERC to submit an executed Amended NERC-WECC Delegation Agreement in informational filings within 30 days of issuance of the February 12 Order. February 12 Order, 146 FERC ¶ 61,092 at P 15. NERC submitted its informational filing on March 4, 2014 in Docket No. RR13-10-001. WECC submitted its informational filing on March 13, 2014 in Docket No. RR13-12-001.

[12] February 12 Order, 146 FERC ¶ 61,092 at P 16. The February 12 Order determined that EEI's protest raised only one new issue regarding waiver of Rule 1205 of the NERC Rules of Procedure. *Id*. P 16 n.19.

[13] 16 U.S.C. § 824o (2012).

[14] February 12 Order, 146 FERC ¶ 61,092 at P 16 (citing December 6 Order, 145 FERC ¶ 61,202 at P 40).

[15] *Id.* (citing December 6 Order, 145 FERC ¶ 61,202 at PP 40-47).

[16] *Id*. (citing December 6 Order, 145 FERC ¶ 61,202 at PP 42-44).

II. Request for Rehearing

9. EEI asserts that the Commission erred in determining that Peak Reliability is eligible to receive funding under FPA section 215 because it is neither a Regional Entity nor the ERO. Second, EEI maintains that the Commission erred in determining that the reliability coordinator and interchange authority functions are eligible for FPA section 215 funding because those functions are not statutory. Third, EEI asserts that the Commission erred by determining that the reliability coordinator function could be sub-delegated by a Regional Entity to a non-Regional Entity. Fourth, EEI states the Commission erred "by failing to meaningfully explain whether the oversight of statutory functions is no longer mandatory."[17] Fifth, EEI states that the Commission erred in determining that Peak Reliability is eligible for FPA section 215 funding because Peak Reliability will be engaged in operational activities. Sixth, EEI maintains that the Commission erred "by failing to meaningfully respond to the legal arguments raised in this proceeding indicating that the sub-delegation framework in the RC Agreement is deficient, lacks meaningful controls to ensure the close oversight of Peak Reliability, and is inconsistent with other Regional Entities' delegation agreements and the Commission's requirements for oversight of delegated statutory functions."[18]

III. Discussion

10. We deny EEI's request for rehearing. As discussed below, the Commission has already rejected EEI's arguments concerning Peak Reliability's eligibility to receive FPA section 215 funding. Moreover, EEI has not identified any alleged errors that are specific to the Commission's acceptance of the compliance filings in the February 12 Order.[19]

11. First, the present request for rehearing is nearly identical to EEI's earlier request for rehearing of the Declaratory Order. In addition to accepting conditionally the governance documents submitted by NERC and WECC in Docket Nos. RR13-10-000 and RR13-12-000, the December 6 Order also rejected rehearing of the Declaratory Order in Docket No. EL13-52-001. Nonetheless, five of the seven alleged errors identified by EEI in this request for rehearing are identical to the alleged errors identified

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[17] EEI March 14, 2014 Request for Rehearing at 7.

[18] *Id.*

[19] EEI did not seek rehearing of the February 12 Order regarding waiver of Rule 1205 of the NERC Rules of Procedure to allow WECC to sub-delegate the reliability coordinator function to a non-Regional Entity. February 12 Order, 146 FERC ¶ 61,092 at PP 17-21.

by EEI in its earlier request for rehearing.[20] Accordingly, the Commission has already issued a final order on the issues for which EEI once again seeks rehearing.[21]

12. Second, while EEI sought rehearing of the Declaratory Order, which the Commission addressed in the December 6 Order, EEI did not seek rehearing of the December 6 Order. Instead, EEI seeks rehearing of the February 12 Order, which only accepted the NERC and WECC compliance filings submitted in response to the December 6 Order. The December 6 Order addressed, on rehearing, the underlying legal issues regarding Peak Reliability's eligibility for FPA section 215 funding. The February 12 Order then found that EEI's protest of the compliance filings, in which EEI raised issues regarding Peak Reliability's eligibility to receive FPA section 215 funding, was beyond the scope of the compliance proceeding. In raising the same arguments in this request for rehearing, EEI claims that the "WECC Compliance Filing was the first time that the specific nature of the sub-delegation structure was documented and therefore the first indication of the controls that would be in place to provide oversight of this purported statutory function."[22] We reject that assertion. WECC submitted a proposed RC Agreement on September 20, 2013 for Commission acceptance. The December 6 Order accepted the proposed RC Agreement with the condition that WECC confirm in a compliance filing that it was sub-delegating the reliability coordinator function to Peak Reliability and, if so, to make the sub-delegation explicit in the RC Agreement. Likewise, with respect to the Amended NERC-WECC Delegation Agreement, the December 6 Order accepted that submission conditioned on NERC making specific changes that were clearly known to EEI as of the date of issuance of the December 6 Order. Thus, the compliance filings did not affect or modify the legal determinations in the December 6 Order on which EEI now seeks rehearing. Accordingly, EEI should have sought rehearing of the December 6 Order and not the February 12 Order unless EEI could identify an alleged error in the February 12 Order pertaining to the Commission's acceptance of the NERC and WECC compliance filings.[23]

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[20] *Compare* EEI March 14, 2014 Request for Rehearing at 6-7, *with* July 22, 2013 Request for Rehearing at 5-6 (Alleged errors 1-4, 6 in the EEI March 14, 2014 Request for Rehearing are identical to alleged errors 1-5 in the EEI July 22, 2013 Request for Rehearing).

[21] December 6 Order, 145 FERC ¶ 61,202 at PP 38-47.

[22] EEI March 14, 2014 Request for Rehearing at 33.

[23] *See PJM Interconnection, L.L.C.*, 133 FERC ¶ 61,277, at P 9 (2010) ("But Shell failed to timely request rehearing of the September 3, 2010 Order, and cannot now raise issues in a protest to a compliance filing that should have been raised in a rehearing

(continued…)

13. Although EEI should have requested rehearing of the December 6 Order, we address the two alleged errors identified by EEI in this request for rehearing that were not identified in EEI's first request for rehearing. EEI alleges that the February 12 Order did not "meaningfully explain whether the oversight of statutory functions is no longer mandatory" and did not "meaningfully respond to the legal arguments raised in this proceeding indicating that the sub-delegation framework in the RC Agreement is deficient, lacks meaningful controls to ensure the close oversight of Peak Reliability, and is inconsistent with other Regional Entities' delegation agreements and the Commission's requirements for oversight of delegated statutory functions."[24] We reject EEI's request for rehearing on these issues because, as the Commission previously determined, Peak Reliability, while functionally independent, is still subject to oversight by NERC and the Commission.

14. The December 6 Order rejected EEI's arguments because, as recognized in the RC Agreement, WECC, subject to NERC and Commission approval, has the authority to terminate the sub-delegation agreement with Peak Reliability.[25] The December 6 Order also found that, pursuant to the NERC Rules of Procedure, Peak Reliability would have to maintain NERC certification as a reliability coordinator. The February 12 Order again confirmed that Peak Reliability, while independent of WECC, still would be subject to Commission and NERC oversight.

15. Accordingly, we conclude that the Commission's and NERC's oversight of Peak Reliability, as recognized in the RC Agreement, is appropriate, and we reject EEI's assertion that such oversight does not constitute the kind of "ongoing, close oversight … which is a required prerequisite for delegated statutory functions."[26] As we noted in the

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request. The only question that Shell may properly present to the Commission is whether the PJM Parties' filings comply with the directives of the September 3, 2010 Order.").

[24] EEI March 14, 2014 Request for Rehearing at 7, 31-32.

[25] Section 4.5.2 of the RC Agreement provides:

> Subject to FERC approval, WECC may terminate this Agreement effective immediately upon thirty (30) days prior written notice thereof to Peak if: (a) Peak loses its NERC certification or registration once obtained; or (b) FERC issues an order determining that Peak should no longer serve as the Western Interconnection's Reliability Coordinator pursuant to this Agreement.

[26] EEI March 14, 2014 Request for Rehearing at 7.

December 6 Order, WECC's sub-delegation to Peak Reliability is consistent with the NERC-WECC Delegation Agreement. Specifically, 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.[27] Moreover, while EEI argues that the specific oversight activities provided for in section 8 of the NERC-WECC Delegation Agreement do not apply to Peak Reliability, the RC Agreement recognizes the Commission's and NERC's oversight authority over Peak Reliability.[28] Nothing in the RC Agreement or the Amended NERC-WECC Delegation Agreement precludes the Commission or NERC from utilizing similar forms of oversight, as those set forth in section 8 of the latter agreement, with respect to Peak Reliability, consistent with that oversight authority.[29]

The Commission orders:

EEI's request for rehearing is hereby denied, for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[27] 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.").

[28] *See supra* note 25.

[29] Section 8 of the Amended NERC-WECC Delegation Agreement sets forth processes and procedures used in NERC's oversight of WECC's performance of WECC's delegated authority and related activities.