

Briefing Note - Panel 1: ERO Governance: Representation and Structure

Background

One of the basic issues that must be addressed with respect to the future of any reliability management regime is governance. Apart from the usual questions as to appropriate institutional architecture that arise in the design of any new regulatory regime, governance issues in the context of the ERO are complicated by the additional consideration that the ERO must be able to work effectively across international borders.¹ This note addresses two aspects of governance that are especially relevant in the interjurisdictional context: representation and ERO structure as it relates to voting procedures.

Representation

A fundamental concern that will engage all jurisdictions in the design of any ERO with cross-border reach is the representation of the affected jurisdictions on the various governance bodies of the organisation. These bodies include not only the Board of Trustees, but also the various committees that do the day-to-day work of the ERO in setting reliability standards and ensuring compliance.²

In particular, any consideration of institutional design must involve the acceptance of some criteria for determining the representation of different jurisdictions on the various bodies. For example, a common criterion that is used in the operation of international intergovernmental organisations is the principle of equality of representation. This is the case, for example, for such North American entities as the International Joint Commission and various NAFTA bodies. It may be that the principle of equality of representation is considered less appropriate in the context of a body such as the ERO, which does not operate as an intergovernmental organisation. In the alternative, then, other criteria for determining representation might be explored – for example, representation based on net energy for load (NEL).

If one were to accept the *status quo* – which is to say, something like the current NERC structure – as the appropriate reference point for criteria, representation on the Board of Trustees would be not be based on jurisdictional representation (which perhaps reflects the regulatory philosophy that the Board members should exercise their independent judgement), with the exception of the requirement that:

¹ This note will be limited to a discussion of the US-Canada environment, although obviously it may well be necessary to address similar issues in the context of Mexico's participation in a North American reliability management regime.

² Although the committee structure may change somewhat in the transition to an ERO, the current major NERC committees include: the Stakeholders' Committee, the Standards Authorization Committee, the Market Committee, the Operating Committee, the Planning Committee, and the Critical Infrastructure Protection Committee. There is also a committee structure related to the NERC's compliance enforcement and certification programs.

The Board must at all times include at least one Independent Trustee with appropriate knowledge and experience of the industry, regulatory, and legal systems in the U.S. and at least one Independent Trustee with similar knowledge and experience in Canada.³

The NERC Bylaws provides for designated representation on the Stakeholders Committee. The NERC Organization and Procedures Manual sets out designated Canadian representation on major standing committees. In practice, there is significant variation in national representation on these other NERC committees, although most are structured so as to assure some Canadian representation.⁴

Of course, it need not be that the same criteria for representation should apply to all governance bodies. For example, criteria such as equality or NEL might be more appropriate for the Board of Trustees than for technical committees, where one could expect an emphasis on ensuring that the best expertise available is represented. In the latter case, then, it may be that the appropriate criterion is phased more in terms of the effectiveness of representation, particularly where jurisdictional sensitivities are accommodated in the voting structure (as discussed below). What would be desirable, however, is a clear articulation of the criteria upon which representation will be determined under the structure of a future ERO.

Structure

This note will focus on two primary areas of structure: voting procedures and membership. While the issues of voting and representation are related, they are also distinct. It may be possible, for instance, that voting procedures can be used to enhance institutional effectiveness where relying on representation alone would not be sufficient to achieve this. For example, there may be some question as to the practicality of basing representation (whether on the ERO Board or on its committees) on the principle of equality, if the balance of the industry is in the U.S. Nevertheless, on those occasions where ERO decisions (whether by the Board or a committee) hold the potential for significant impacts across the international border, it may well be that the representation on the ERO by one jurisdiction would not lead to an adequate reflection of the respective interests of both countries. In this case, it may be useful to have qualified voting procedures (for example, a national “veto” or a special majority) for decisions that have special transnational significance.

³ *NERC Bylaws*, Art III:2:a. Provision is made for similar representation for Mexico in the event that it becomes a participant in the reliability regime.

⁴ By way of example, the current NERC roster of committee members indicates one member each from Canada on the Compliance and Certification Committee and the Technical Steering Committee, three members on the Critical Infrastructure Protection Committee, four voting members each on the Market Committee and the Planning Committee and six voting members on the Operating Committee. While Canada has some representation on all the major committees, this is not always the case for smaller groups; for example, there is no Canadian representation indicated on either the Planning Reliability Model Task Force or the Planning Standards Task Force.

NERC now has ten members, the ten existing regional reliability councils. Under the NERC Bylaws, only the regional reliability councils are eligible to be NERC members. Their membership in NERC is voluntary. A condition of voluntary NERC membership is assuming the obligation to contribute to the support of NERC's operating budget. Also, members are obligated to follow the organization's reliability standards as a condition of membership. Members have the right to vote on new members to amend the corporate charter, and to amend the bylaws.

The proposed U.S. legislation does not address the topic of membership in the ERO. Some parties contend that the ERO should continue to have members drawn from industry, but not necessarily from the regional reliability councils. One purpose of having members is to ensure that at least some industry representatives are committed to participating in the design and running of the ERO as an organization. Members may feel responsible for the success of the organization. This would encourage their volunteering for participation on ERO committees and help ensure that the ERO has a base group of people and technical resources needed to accomplish its objectives. For example, membership could be required for all providers of transmission service and permitted for other industry stakeholder groups.

Others may believe that there is no need for ERO membership because ERO funding will be provided independent of membership and all industry stakeholders should have an equal voice in ERO standard-setting and perhaps other governance decisions. Also, under the legislation all parties are required to follow the ERO's reliability standards whether they are members or not. Any provision for membership in the ERO must be compatible with the provision of the proposed U.S. legislation that any ERO organizational rule "assure [the ERO's] independence ... while assuring fair stakeholder representation in the selection of its directors and balanced decision making in any committee or subordinate organizational structure."

Questions - Panel 1: ERO Governance and representation

Representation

- How should the ERO provide for appropriate representation on the Board of Trustees and various committees so as to allow the ERO to function effectively across international borders?
- Specifically, what criteria should be used to determine the representation on the NERC Board and committees? [equality, net energy for load, *status quo*, etc.]
- Should the same criteria apply to the Board as to committees?
- What criteria have been used for determining the representation on other cross-border entities (e.g. NAFTA bodies, International Joint Commission on waterways) and how relevant are they to the proposed ERO?

Structure

- Does the ERO model have appropriate voting procedures to ensure its international effectiveness? (i.e. for standards development)
- Should there be provisions for qualified voting/vetoes in the Board/committees for issues of transnational significance?
- Should the ERO have members (why or why not?) If so, what should be the functions, responsibilities, and rights of members? Should the membership be mandatory? If so, who should be made members?