

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Availability of Certain North American)
Electric Reliability Corporation) **Docket No. RM15-25-000**
Databases to the Commission)

**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION,
LARGE PUBLIC POWER COUNCIL AND
THE TRANSMISSION ACCESS POLICY STUDY GROUP**

I. INTRODUCTION AND EXECUTIVE SUMMARY

The American Public Power Association (“APPA”), the Large Public Power Council (“LPPC”) and the Transmission Access Policy Study Group (“TAPS”) (together, the “Public Power Associations”) hereby comment on the Notice of Proposed Rulemaking (“NOPR”) issued in this docket by the Federal Energy Regulatory Commission (“FERC” or the “Commission”) on September 17, 2015.

The Public Power Associations strongly urge the Commission and the North American Electric Reliability Corporation (“NERC”) to work together to enable the Commission to secure the information it needs in order to perform its oversight role under Federal Power Act (“FPA”) section 215.¹ The Public Power Associations fully support NERC's offer to provide the Commission with detailed data on an anonymized basis, while establishing an “Information Sharing Working Group,” designed to serve as a vehicle for ongoing communication between NERC and FERC to provide the Commission with needed information. NERC’s offer appears well-gearred to providing the Commission with the information it needs, along with a framework

¹ 16 U.S.C. § 824o.

for exploring what additional information may be necessary and the procedures needed to secure the data.

The Public Power Associations understand that the Commission has a legitimate interest, expressed in existing regulations, in having access to such information as is needed to fulfill its oversight responsibility. The Public Power Associations have no interest in standing in the way of that important function. Having said this, the NOPR does not appear tailored to achieving that goal in a manner consistent with the statutory scheme. The Public Power Associations are concerned that the level of detail sought by the Commission in the NOPR suggests a shift in the balance of responsibilities between NERC, the certified Electric Reliability Organization (“ERO”), and FERC contemplated by FPA section 215, with the Commission seeking access to a subset of the raw data available to NERC in order to perform primary data analysis.

While the Public Power Associations recognize that there is some degree of overlapping responsibility written into the statute, the NOPR suggests a front-line role for FERC in connection with the development of Reliability Standards and periodic assessments of grid reliability that does not appear to be contemplated by the statute. A move by the Commission into a more active role in the standards development process creates the potential for mixed signals and confusion in the focus of standards development, and risks eroding the ERO model established by Congress.

The Public Power Associations recognize and respect the important role FERC plays in overseeing NERC’s standards development and enforcement activity, but urge the Commission to be mindful of the inefficiencies and potential confusion that would result from a situation in which NERC and FERC perform the same analytical roles. Moreover, the evidence proffered by NERC in its 2015 State of Reliability Report indicates that traditional risks to reliable operation

of the bulk-power system are increasingly well-mitigated by improving industry performance, measured in part by compliance with NERC reliability standards, as well as by the generation, transmission and relay misoperations data sought by the Commission in this proceeding.

The industry, FERC and NERC face significant challenges ahead associated with emerging issues, including Clean Power Plan compliance, the impact of changing resource mix on resource adequacy forecasting and reliable real-time operations, and increased reliance on natural gas. As we move forward to tackle these tough issues, the reliability objectives shared by all – Congress, the Commission, NERC, and the industry – will be advanced through continued collaboration between Commission staff and NERC, as the ERO certified by the Commission, to make sure that the Commission receives access to the information it needs to perform its oversight role in this unique statutory scheme. Accordingly, the Public Power Associations encourage the Commission to work closely with NERC to structure access to such information as is necessary in enabling FERC to carry out its core responsibility under the statute.

II. BACKGROUND

A. The NOPR

The Commission proposes to amend its regulations to require NERC to provide the Commission and its staff with access on an ongoing basis to three databases compiled and maintained by NERC. The proposal applies to three NERC databases: (1) the Transmission Availability Data System (“TADS”), (2) the Generating Availability Data System (“GADS”), and (3) the protection system misoperations database.

The Commission states that NERC’s maintenance of the databases is a section 215 jurisdictional activity over which the Commission has oversight responsibility, and that the proposal in the NOPR is consistent with existing section 39.2(d) of its regulations, which

specifies that NERC and the Regional Entities shall provide the Commission with “such information as is necessary to implement section 215 of the Federal Power Act.”² The Commission further says that access to the data is needed:

(1) to evaluate the need to direct new or modified Reliability Standards under section 215(d)(5) of the FPA; and (2) to better understand NERC’s periodic assessments and reports, including those that may be requested by the Commission, regarding the reliability and adequacy of the Bulk-Power System under section 215(g) of the FPA.³

As to the first of these objectives, FERC says that the proposed access would inform the Commission most efficiently “about reliability trends and reliability gaps that might require the Commission to direct the ERO to develop new or proposed Reliability Standards.”⁴ The Commission says that section 215(d) of the statute “tasks both FERC and the ERO” with the responsibility to monitor reliability trends or reliability gaps that might warrant the development or modification of a Reliability Standard.”⁵ The Commission further asserts that the second of its aims (understanding NERC assessments and reports) will be assisted by “having direct access to the underlying data.”⁶

B. Interest of the Public Power Associations

APPA is the national service organization representing the interests of not-for-profit, publicly-owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15% of all kilowatt-hour sales to ultimate customers and serve over 48

² NOPR at P 16 (citing 18 C.F.R. § 39.2(d)).

³ *Id.*, P 17.

⁴ *Id.*, P 18.

⁵ *Id.*

⁶ *Id.*, P 20.

million people, doing business in every state except Hawaii. Public power systems own approximately 10.3% of the total installed generating capacity in the nation.

LPPC is an association of the 26 largest state-owned and municipal utilities in the nation.⁷ LPPC's membership is located throughout the nation, both within and outside RTO boundaries, and the members comprise the larger, asset owning members of the public power community.

TAPS is an association of transmission-dependent utilities (“TDUs”) in more than 35 states, promoting open and non-discriminatory transmission access.⁸ TAPS members have long recognized the importance of grid reliability. As TDUs, TAPS members are users of the bulk-power system, highly reliant on the reliability of facilities owned and operated by others for the transmission service required to meet TAPS members’ loads. In addition, many TAPS members participate in the development of and are subject to compliance with NERC Reliability Standards.

The Public Power Associations' members operate across a broad spectrum of functions listed in NERC's Reliability Functional Model and have long been active in NERC's standards development process, on NERC’s Members Representatives Committee and a long list of NERC committees and task forces. These members are committed to the reliability of the electric grid.

⁷ LPPC’s members are: Austin Energy, Chelan County Public Utility District No. 1, Clark Public Utilities, Colorado Springs Utilities, CPS Energy (San Antonio), ElectriCities of North Carolina, Grand River Dam Authority, Grant County Public Utility District, IID Energy (Imperial Irrigation District), JEA (Jacksonville, FL), Long Island Power Authority, Los Angeles Department of Water and Power, Lower Colorado River Authority, MEAG Power, Nebraska Public Power District, New York Power Authority, Omaha Public Power District, Orlando Utilities Commission, Platte River Power Authority, Puerto Rico Electric Power Authority, Sacramento Municipal Utility District, Salt River Project, Santee Cooper, Seattle City Light, Snohomish County Public Utility District No. 1, and Tacoma Public Utilities.

⁸ Duncan Kincheloe, Missouri Public Utility Alliance, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

III. COMMENTS

A. The Commission Should Work with NERC to Secure Data Relevant to its Oversight Role Under FPA Section 215

The Public Power Associations encourage FERC to accept NERC's offer to work together to establish a mutually agreeable set of protocols providing the Commission with access to information needed to exercise its oversight function with respect to standards development, and to provide background for understanding NERC's periodic assessments. In comments filed contemporaneously, NERC proposes to:

- (i) Provide Commission staff with anonymized TADS, GADS and protection system misoperations data within 90 days of the Commission's order on the NOPR; and
- (ii) Work collaboratively with Commission staff through an Information Sharing Working Group to develop NERC-managed tools to provide Commission staff access to anonymized versions of TADS, GADS and protection system misoperations databases.

The Public Power Associations urge that, rather than proceed immediately with the proposal set forth in the NOPR, the Commission promptly adopt NERC's proposal as an interim measure, expressly subject to the Commission revisiting whether further action is necessary after experience over a reasonable period of time (perhaps one or two years).

As the Public Power Associations understand it, NERC's proposal is aimed at providing the Commission with information that should enable it to make informed judgments as to the success of NERC's existing body of standards, and ongoing efforts by NERC to fill reliability gaps. The proposal is designed with recognition given to the fact that NERC, as the designated ERO, is charged in the first instance with ascertaining the necessary scope of Reliability Standards required to maintain an adequate level of grid reliability.⁹ The Commission's principal role under the statute is to oversee this and NERC's enforcement processes.

⁹ 16 U.S.C. § 824o(c).

FPA section 215 plainly contemplates that the ERO serve as the principal agent for standards development and the assessment of grid reliability. Section 215(b) specifies that FERC has jurisdiction over the ERO within the United States “for purposes of approving reliability standards established under this section and enforcing compliance with this section.” Sections 215(c) and (d) of the statute place NERC in a primary position with respect to standards development. Section 215(c)(1) specifies that the Commission may certify an organization as the ERO provided it is determined that it “has the ability to develop and enforce...reliability standards that provide for an adequate level of reliability of the bulk-power system.” Subsection (c)(2) requires that the ERO provide for “reasonable notice and opportunity for public comment, due process, openness and balance of interests in developing reliability standards...,” as well as assure “fair stakeholder representation” in the selection of directors and “balanced decisionmaking in any ERO committee.”

FPA section 215(d)(2) specifies that the Commission “shall give due weight to the technical expertise of the [ERO] with respect to the content of a proposed standard or modification to a reliability standard....” This statutory deference on matters related to standards development is limited only by the directive that the Commission “shall not defer with respect to the effect of a standard on competition.” Section 215(d)(5) clearly provides that the Commission may “order the [ERO] to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter. . .” but section 215 does not authorize the Commission to develop reliability standards. This structure clearly contemplates that the primary role for standards development is the ERO’s, with FERC exercising oversight authority.

Consistent with the statutory text and structure, NERC's Rules of Procedure establish a stakeholder model for standards development, for which NERC has secured accreditation by the American National Standards Institute ("ANSI"). Even where the Commission has had reason to criticize the stakeholder process, it has wisely deferred to NERC's central role in standards development. As the Commission has commented: "[w]e recognize that the statutory paradigm in section 215 of the FPA, by which the ERO is responsible for developing Reliability Standards through a stakeholder process that represents a balance of interests, differs significantly from the rest of the FPA statutory framework."¹⁰ This broad-based process capitalizes on NERC's expertise and the depth of knowledge possessed by industry participants involved in the standards development process.

The Public Power Associations are concerned that the NOPR suggests a shift in the balance of responsibilities between NERC and FERC contemplated by FPA section 215. The Public Power Associations recognize that there is some degree of overlapping responsibility written into the statute. Certainly, the Commission can direct NERC under section 215(d)(5) to "submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter." But considered in context, this authority is clearly supplemental to NERC's primary role in developing Reliability Standards, subject to Commission oversight under FPA section 215(b).

As to reliability assessment, FPA section 215(g) specifies that the "ERO shall conduct periodic assessments of the reliability and adequacy of the bulk power system," a responsibility which NERC carries out through its periodic reports. But it is important to emphasize that here, unlike with respect to standards development, the statute does not even give the Commission an

¹⁰ *North American Elec. Reliability Corp.*, 130 FERC ¶ 61,203 at P 2 (2010).

oversight function, much less an approval role. FPA section 215(b) specifies that FERC has jurisdiction over NERC only for purposes of approving standards and enforcement.¹¹

Without doubt, FERC has a legitimate interest and need to be informed in a manner appropriate to its oversight responsibility under FPA section 215, and to be sufficiently well-informed to exercise its authority to direct the submission of standards as to specific matters, or to require modification of specific standards. The Public Power Associations believe that NERC's offer to work with the Commission to provide access to data and analyses in support of the Commission's responsibilities offers a path forward that respects the roles contemplated for FERC and NERC, respectively, under the FPA.

B. The NOPR Proposal Risks Disclosure of Sensitive Data

Though the Commission appropriately recognizes that confidential information in the NERC databases may warrant protection,¹² the Public Power Associations are concerned that the NOPR's suggestion that protection is available under existing regulations¹³ is an imperfect fix. The concern relates to the inevitable risk of inadvertent disclosure and to the potential for disclosure by FERC under the Freedom of Information Act ("FOIA").¹⁴

As NERC details in its comments, the sensitivity of the data lies in the insights that may be gleaned as to transmission and generation vulnerabilities. As NERC's comments also make clear, data solely in NERC's possession is not subject to disclosure under FOIA. The ERO and the Regional Entities are not "departments, agencies or instrumentalities of the United States

¹¹ FPA section 215 (c) provides for ERO certification, and section 215(f) requires Commission approval for the ERO's rules.

¹² NOPR at P 22.

¹³ FERC cites 18 C.F.R. §§ 388.112 and 388.113.

¹⁴ 5 U.S.C. § 552.

Government,”¹⁵ and FOIA applies only to federal agencies.¹⁶ Accordingly, information in NERC’s possession is not at risk of disclosure under FOIA. By contrast, while FERC’s implementing regulations provide the Commission with the authority to restrict disclosure, protection is not assured under current regulations, and disclosure has certainly been granted, even for information designated as Critical Energy Infrastructure Information (“CEII”) under Commission regulations.¹⁷ Recently-enacted FPA section 215A¹⁸ provides unqualified protection from disclosure for material designated as CEII. But rules under subsection 215A(d)(2) governing the criteria and procedure for the designation of CEII for purposes of this new provision have yet to be established,¹⁹ and while the Public Power Associations would certainly advocate that the data sought by the Commission in this docket qualifies as CEII under these new provisions, that remains to be determined.

These concerns lend further support to NERC’s proposal to work with the Commission in order to provide access to needed information without having the raw data downloaded to Commission servers. Should the Commission remain convinced that accessing the NERC databases is critical to its mission, it may be that the associated security risks can be managed through protocols enabling FERC staff to review the databases, either on-site at NERC offices or remotely, without downloading them to Commission servers. Taking NERC up on its offer to

¹⁵ See Energy Policy Act of 2005, § 1211(b).

¹⁶ 5 U.S.C. § 552(a).

¹⁷ See, e.g., *Scott Deffenderfer, et. al.*, 120 FERC ¶ 62,020 at P 8 (2007); *Michael J. Schubiger*, 120 FERC ¶ 62,131 at P 11 (2007); *Sunil Talati*, 120 FERC ¶ 62,113 at P 13(2007); *Edward J. Park*, 120 FERC ¶ 62,061 at P 15 (2007); *Hala Ballouz*, 119 FERC ¶ 62,204 at P 14 (2007).

¹⁸ FPA section 215A was signed into law by President Obama on December 4, 2015, as part of the Fixing America’s Surface Transportation Act.

¹⁹ The new provision gives the Commission one year after the date of enactment to promulgate rules governing the criteria and procedures for designation of CEII.

establish an Information Sharing Working Group would enable NERC and the Commission to explore these options.

C. If FERC Downloads NERC Data, Use of that Data Should be Limited

Should the Commission proceed to require access to NERC's databases as proposed, the Public Power Associations urge the Commission to limit use of the information expressly to the articulated purpose – that is, to inform that Commission with respect to perceived reliability gaps and to assist in understanding NERC's periodic assessments. Limiting use of the data to the stated purposes would preclude its use in an enforcement setting.

As NERC represents, the TADS, GADS and misoperations databases include information provided to NERC by registered entities on a voluntary basis. The Public Power Associations' members consider voluntary information sharing with NERC to be an important element of their participation in the reliability community, but it is a process of which they will inevitably become wary if it risks implication in enforcement matters. This would have an inevitably inhibiting effect on current and future information sharing by the industry, to the detriment of NERC's effectiveness. For this reason, the Public Power Associations ask that any regulations that are promulgated as an outgrowth of the NOPR expressly restrict use of the data to which FERC gains access to FERC's articulated objectives, *i.e.*, to inform the Commission with respect to reliability gaps and to provide support for a better understanding of NERC's periodic reliability assessments, thus barring its use for enforcement purposes.

IV. CONCLUSION

For reasons articulated above, the Public Power Associations strongly urge the Commission to work cooperatively with NERC to enable the Commission to secure the information it needs to exercise its oversight role under FPA section 215. The proposal

advanced by NERC in its comments in this docket appears to the Public Power Associations to be a reasonable means of advancing this objective.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic mail or first class mail, upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, D.C., this 15 day of December, 2015.

/s/ _____
Jonathan P. Trotta