
601 13th Street, NW
Suite 1000 South
Washington, DC 20005-3807
TEL 202.661.2200
FAX 202.661.2299
www.ballardspahr.com

Howard H. Shafferman
Direct: 202.661.2205
Fax: 202.626.9036
hhs@ballardspahr.com

December 22, 2011

SUBMITTED ELECTRONICALLY
(to ROPcomments@nerc.net)

Mr. Gerry Cauley
President and CEO
North American Electric Reliability Corporation
3353 Peachtree Road NE
Suite 600, North Tower
Atlanta, GA 30326

Re: Comments of the ISO/RTO Council Regarding November 7, 2011 Posting of
Proposed Changes to NERC Rules of Procedure

Dear Mr. Cauley:

The ISO/RTO Council (the "IRC") hereby submits via e-mail this cover letter and the IRC's attached comments on the November 7, 2011 posting of proposed changes to the NERC Rules of Procedure.

Very truly yours,

/s/ Howard H. Shafferman

Howard H. Shafferman
Counsel for
ISO New England Inc. and
On Behalf of the ISO/RTO Council

cc: Gerry Cauley
David Cook, Esq.
Rebecca Michael, Esq.
(via e-mail)

**COMMENTS OF THE ISO/RTO COUNCIL
REGARDING NOVEMBER 7, 2011 POSTING OF PROPOSED CHANGES TO NERC
RULES OF PROCEDURE, SECTIONS 100-1600, AND ASSOCIATED APPENDICES 4B,
4C, 5A AND 8, AND DELETION OF APPENDICES 3C AND 6**

The ISO/RTO Council (the “IRC”) provides its comments on the proposed changes to the NERC Rules of Procedure (“ROP”) posted on November 7, 2011 (the “November 7 Posting”). The IRC focuses these comments primarily on the proposal to create a new Section 5.11 of the ROP’s “Appendix 4C – Compliance Monitoring and Enforcement Program.”¹ The IRC also comments on two other proposed changes to the ROP (the addition of an “ISO/RTO” definition to Appendix 4C, and a modification to Section 318 of the ROP) that could have an impact on the interactions between the ISOs/RTOs and NERC. Finally, the IRC notes its support of the joint comments being submitted by the Edison Electric Institute, the American Public Power Association and the National Rural Electric Cooperative Association (the “EEI/APPA/NRECA Comments”).²

I. EXECUTIVE SUMMARY OF COMMENTS

The IRC objects strongly to the proposed addition of Section 5.11 to the ROP’s Appendix 4C. Much of the content of this section is in direct conflict with – and, if filed with FERC, impermissibly collaterally attacks – the 2008 “Guidance Order”³ of the Federal Energy Regulatory Commission (“FERC” or the “Commission”) and related orders regarding the

¹ Although NERC issued a revised version of Section 5.11 in a November 22, 2011 posting (the “November 22 Posting”), the revisions do not affect the IRC’s views, as explained in Section V.A. of these comments, below.

² The IRC supports the EEI/APPA/NRECA Comments, with the exception of the comments on Appendix 4C, Section 5.11, on which the IRC is submitting these comments, and on Appendix C, Section 3.8.

³ *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (the “Guidance Order”).

recovery by ISOs and RTOs of all or part of the costs of penalties imposed on ISOs and RTOs by NERC, its Regional Entities or FERC from third-party entities whose actions or omissions cause or contribute to the penalized activity/inactivity (individually, for purposes of these comments, a “Contributing Entity”). Moreover, the proposed language in numerous instances exceeds the scope of the statutory authority of NERC, and unlawfully impinges on the Section 205 filing rights of the ISOs and RTOs.

II. IDENTITY OF THE IRC

The IRC is comprised of the Alberta Electric System Operator (“AESO”), the California Independent System Operator (“CAISO”), Electric Reliability Council of Texas (“ERCOT”), the Independent Electricity System Operator of Ontario, Inc., (“IESO”), ISO New England, Inc. (“ISO-NE”), Midwest Independent Transmission System Operator, Inc., (“MISO”), New York Independent System Operator, Inc. (“NYISO”), PJM, Southwest Power Pool, Inc. (“SPP”), and New Brunswick System Operator (“NBSO”).⁴ IESO is not subject to the Commission’s jurisdiction, and these comments do not constitute agreement or acknowledgement that they can be subject to the Commission’s jurisdiction.

The IRC’s mission is to work collaboratively to develop effective processes, tools and standard methods for improving the competitive electricity markets across North America. In fulfilling this mission, it is the IRC’s goal to provide a perspective that balances reliability standards with market practices so that each complements the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers.

⁴ IESO does not join in the statement of support, herein, of the EEI/APPA/NRECA Comments. AESO and NBSO are not subject to the Commission’s jurisdiction, and do not join in these comments.

IRC members conduct their operations in compliance with the NERC Reliability Standards. IRC members operate the bulk power system, administer the organized wholesale electricity markets, and act as the planning coordinators within their respective regions.

III. BACKGROUND

The background for these comments is provided by a series of Commission orders involving the manner in which NERC and its Regional Entities investigate and assess penalties against ISOs and RTOs pursuant to their authority under Section 215 of the Federal Power Act (“FPA”).⁵

The initial Commission orders implementing Section 215 – Order Nos. 672 and 672-A – denied requests to: (i) exempt non-profit RTOs and ISOs from electric reliability organization (“ERO”) penalties for violations of the ERO’s reliability standards; and (ii) authorize RTOs and ISOs to recover such monetary penalties from their customers on a generic basis. However, the Commission stated it would consider on a case-by-case basis proposals under Section 205 of the FPA by RTOs and ISOs to recover the costs of any monetary penalties that may be imposed on them for the violation of Reliability Standards.⁶

Subsequently, the Commission issued the Guidance Order to provide a template through which it would consider filings made by an ISO/RTO to recover from Contributing Entities the costs of any ERO penalties assessed against it. The recent FERC order addressing the joint PJM Interconnection, L.L.C. and certain First Energy companies’ petition for FERC to authorize those companies to intervene in a Regional Entity Enforcement Hearing being conducted by

⁵ The investigations and assessments are conducted pursuant to NERC’s Compliance Monitoring and Enforcement Program (“CMEP”), approved by the Commission initially in *North American Electric Reliability Council*, 119 FERC ¶ 61,060 (2007); *order on reh'g*, 122 FERC ¶ 61,245 (2008).

⁶ See Guidance Order, at P 3.

ReliabilityFirst Corporation (“ReliabilityFirst”), for which PJM was the subject, summarizes the Guidance Order’s template for ISO/RTO cost recovery as follows:

In [the Guidance Order], the Commission provided guidance regarding the recovery of penalties assessed against regional transmission organizations (RTO) and independent system operators (ISO) pursuant to section 215(e) of the FPA for violation of a mandatory reliability standard. The Guidance Order indicated that an RTO or ISO could seek cost recovery for reliability-related penalties on a case-by-case basis. The Commission provided [at P 21] that an RTO or ISO could seek a direct assignment of a monetary penalty to another entity that the RTO or ISO deems responsible for the violation. “However, to ensure due process to that targeted entity, the Commission will not entertain any such (FPA section 205) filing unless the targeted entity has been notified during the course of the investigation [or] other inquiry into, or hearing of that matter, that an RTO or ISO believes that the targeted entity may be responsible for a violation.” [Guidance Order, at P 23]. Further, the Commission made clear that a section 205 proceeding for a direct assignment should not function as a second, de novo review of the underlying investigation. Alternatively, if a direct assignment is not appropriate, the RTO or ISO can seek to pass on the costs of a monetary penalty for a FPA section 215 violation by spreading the costs among all members or customers of the organization. [Guidance Order, at P 25]⁷

The Guidance Order also stated that the Section 205 proceeding in response to an ISO or RTO filing “will be limited to the question of whether penalty costs should be assigned to an entity already identified during the investigative or hearing stage of the enforcement process.”⁸

In addition, the Guidance Order stated that: “It is therefore important for the RTOs and ISOs to include provisions regarding the appropriate responsibility for reliability-related monetary penalties in their contracts with their members and customers and/or in their tariffs, including provisions regarding the appropriate responsibility for such penalties on the ISOs and RTOs.”⁹

⁷ See *Monongahela Power Co., West Penn Power Co., The Potomac Edison Co., and PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,226 (2011) (the “PJM Hearing Order.”) (footnotes converted to brackets).

⁸ Guidance Order, at P 23.

⁹ Guidance Order, at P 24 (footnote omitted).

In response to the Guidance Order, a number of ISOs and RTOs filed contract/tariff provisions establishing explicit mechanisms for seeking FERC authority to assign penalties to their members and customers.¹⁰ As explained in the PJM Order, for example, the core of this mechanism entails the following steps:

Section 1.3(a) of Schedule 11 would authorize PJM to “directly allocate [] penalty costs or a portion thereof to the Member or Members whose conduct contributed to the Reliability Standards violation(s).” According to section 1.3(a), PJM would only have this authority if all three of the following preconditions are met:

- The target “Members receive[] notice and an opportunity to fully participate in the Compliance Monitoring and Enforcement Program” conducted by NERC or NERC's Regional Entities.
- The NERC Compliance Monitoring and Enforcement Program holds a proceeding that finds that the target Members at least in part “contributed ... to the NERC Reliability Standards violation(s),” and files this finding with the Commission.
- NERC also files a root cause filing with the Commission, “identifying the Member's or Members' conduct as causing or contributing to the Reliability Standards violation charged against PJM.”¹¹

As explained by the Commission, “A ‘root cause’ proceeding is an investigation into the ‘root cause’ of the reliability violation conducted by NERC or its Regional Entity, pursuant to the Compliance Monitoring and Enforcement Program approved by the Commission.”¹²

Significantly, in the context of these IRC comments, the Commission has specifically allowed the potential assignment (through an ISO/RTO Section 205 filing) of ISO/RTO penalty costs to specified Contributing Entities that are not registered with NERC.¹³ To facilitate this mechanism, the existing ROP recognizes that RTOs and ISOs may petition the Commission to

¹⁰ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 128 FERC ¶ 61,229 (2009) (“MISO Assignment Order”); *New York Independent System Operator, Inc.*, 127 FERC ¶ 61,196 (2009); *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,260 (2008) (“PJM Assignment Order”).

¹¹ PJM Assignment Order, at P 12.

¹² MISO Assignment Order, at n.16.

¹³ See PJM Assignment Order, at PP 40-41.

permit intervention by Contributing Entities in the enforcement hearings conducted by Regional Entities.¹⁴

In the PJM Hearing Order, the Commission permitted the intervention of FirstEnergy companies in a Regional Entity hearing conducted by ReliabilityFirst, as requested in a joint petition of PJM and those companies. Intervention by a Contributing Entity obviously facilitates the FERC-required conduct of a CMEP “root cause” proceeding identifying whether the entity in fact contributed to the violation, and enhances the quality and thoroughness of the reliability process and the root cause determination to be filed subsequently by NERC.¹⁵

ReliabilityFirst had protested the intervention petition, on the basis that:

...intervention by FirstEnergy is inappropriate and will cause unwarranted delay and disruption to the Enforcement Hearing...because: FirstEnergy does not have a “direct” interest in the Enforcement Hearing; FirstEnergy has no right to intervene in the Enforcement Hearing that is expressly conferred by statute or by Commission rule, order or other action; and that FirstEnergy has not shown that intervention is in the public interest.

In rejecting the ReliabilityFirst protest, the Commission stated:

15. First, our Guidance Order regarding the assessment of a monetary penalty against an RTO or ISO for violation of a Reliability Standard reasonably contemplated that an entity “targeted” for a direct assignment of such a penalty, such as FirstEnergy in the immediate proceeding, should have an opportunity to participate in the underlying enforcement proceeding in which the RTO or ISO is a respondent. The Guidance Order, contemplating circumstances similar to that now faced by FirstEnergy, emphasized the need to ensure due process to a targeted entity. The Guidance Order specifically indicated that an entity that may be subject to a section 205 proceeding for a direct assignment of a reliability-related penalty should be given notice of an underlying ERO or Regional Entity investigation. It is reasonable to infer that the targeted entity’s due process rights also include the ability to participate in a regional Enforcement Hearing where its liability may be implicated.

¹⁴ See, e.g., ROP Appendix 4C, Attachment 2, at § 1.2.12.

¹⁵ Root cause determinations also serve a useful role in avoiding unnecessary “socialization” of penalties assessed on ISOs and RTOs.

16. Second, we find that FirstEnergy has adequately established that it represents an interest which may be directly affected by the outcome of the ReliabilityFirst Enforcement Hearing. According to the petition, PJM notified FirstEnergy in a May 4, 2011 letter that FirstEnergy may be implicated as contributing to the violations alleged in the Enforcement Hearing because FirstEnergy is the NERC-registered transmission owner and generation owner for Bulk-Power System components that were affected during the system disturbance arising from the alleged violations. The petition further states that FirstEnergy “believes that [its] actions, or inactions, arising from the same set of facts at issue in the subject investigation could be raised at the Enforcement Hearing . . . [and] [a]s such, certain findings of fact regarding . . . [FirstEnergy’s] culpability made at the hearing could result in PJM proposing a direct assignment of a monetary penalty against [FirstEnergy].” ReliabilityFirst posits that FirstEnergy’s interest in the Enforcement Hearing is speculative. However, we find that the PJM letter notified FirstEnergy that it may be the subject of a direct assignment of any monetary penalties resulting from the ReliabilityFirst enforcement action.

17. While the Enforcement Hearing may focus on PJM’s alleged violations, PJM’s alleged violations and FirstEnergy’s actions (or inactions) share a common set of facts. Accordingly, we find that the petition provides enough factual detail to establish that the Enforcement Hearing may result in findings that lead PJM to seek an assignment of penalties against FirstEnergy, thus demonstrating that FirstEnergy maintains an interest in the Enforcement Hearing.¹⁶

Since 2009, representatives of the IRC have been engaging in discussions with representatives of NERC regarding modest revisions to the ROP to streamline the process by which interventions by targeted entities in CMEP enforcement hearings are achieved. The Guidance Order, as discussed above, allows assignments of penalties by an ISO/RTO only where the Contributing Entity has been notified and may participate in the hearing. Because the existing ROP has *prohibited* third-party interventions except where FERC has specifically authorized them,¹⁷ the ISOs/RTOs sought a simple revision to the ROP permitting the NERC Hearing Body to itself grant such interventions in response to an ISO or RTO request, as a less cumbersome means of fulfilling the participation requirement of the Guidance Order.

¹⁶ PJM Hearing Order, at PP 15-17.

¹⁷ See ROP Appendix 4C, Attachment 2, at § 1.2.12.

The discussions, however, have borne little fruit. Presumably, FERC's rejection of ReliabilityFirst's protest of the intervention by the First Energy companies has motivated NERC's issuance of the ISO/RTO-related portion of the November 7 Posting. As explained in these comments, the proposed addition of Section 5.11 to Appendix 4C of the ROP represents an unexpected, overly complex, unacceptable and fundamental shift in direction by NERC. This shift in direction seeks to prescribe rules that are restrictive and unlawful, judged against the standards enunciated by the Commission orders described above and against the legal framework described in the next section.

IV. THE LEGAL FRAMEWORK

The pertinent legal framework for these comments is set forth below.

A. NERC's Authority is Set Forth in, and Limited by, Section 215 of the Federal Power Act

NERC's authority and role is set forth in, and limited by, Section 215 of the Federal Power Act. As summarized by the Commission in Order No. 672:

20. ... New Section 215 of the FPA provides for a system of mandatory, enforceable Reliability Standards. Under the new electric power reliability system enacted by the Congress, the United States will no longer rely on voluntary compliance by participants in the electric industry with industry reliability requirements for operating and planning the Bulk-Power System. Congress directed the development of mandatory, Commission-approved, enforceable electricity Reliability Standards.

21. The Commission will certify a single Electric Reliability Organization, the ERO, to oversee the reliability of the United States' portion of the interconnected North American Bulk-Power System, subject to Commission oversight. It will be responsible for developing and enforcing the mandatory Reliability Standards. The Reliability Standards will apply to all users, owners and operators of the Bulk-Power System. The Commission has the authority to approve all ERO actions, to order the ERO to carry out its responsibilities under these new statutory provisions, and also may independently enforce Reliability Standards.

22. The ERO must submit each proposed Reliability Standard to the Commission for approval. Only a Reliability Standard approved by the Commission is enforceable under Section 215 of the FPA.

23. The ERO may delegate its enforcement responsibilities to a Regional Entity. Delegation is effective only after the Commission approves the delegation agreement. A Regional Entity may also propose a Reliability Standard to the ERO for submission to the Commission for approval. This Reliability Standard may be either for application to the entire interconnected Bulk-Power System or for application only within its own region.

24. The ERO or a Regional Entity must monitor compliance with the Reliability Standards. It may direct a user, owner or operator of the Bulk-Power System that violates a Reliability Standard to comply with the Reliability Standard. The ERO or Regional Entity may impose a penalty on a user, owner or operator for violating a Reliability Standard, subject to review by, and appeal to, the Commission.

Significantly, there is no mention in Section 215 or in Order No. 672 of authority of the ERO to oversee or regulate the process by which FERC-jurisdictional ISOs and RTOs may seek to recover from Contributing Entities the costs of penalties assessed by the ERO.

B. The Guidance Order Makes Clear that FERC Has Sole Jurisdiction over the Mechanism By Which ISOs and RTOs May Seek to Recover From Customers the Costs of Penalties Assessed by the ERO

In the Guidance Order, FERC established acceptable mechanisms for ISOs/RTOs to directly assign penalties to their customers that are responsible in whole or in part for the ISO's/RTO's incurrence of the penalty. Specifically, ISOs/RTOs may make Section 205 filings with FERC, proposing direct assignments provided that the assignees are on notice that such an assignment is possible. Significantly, the Guidance Order did not give NERC or the Regional Entities a role in notifying third parties, authorizing, reviewing, or granting direct assignments of penalties by ISOs/RTOs. It established an exclusively FERC-administered process.

Moreover, NERC is subject to FERC's jurisdiction under Section 215 of the FPA and Section 39 of FERC's regulations. While NERC does have a statutory role invested by FERC to develop, audit and enforce Reliability Standards, procedurally NERC is no different from any other person or public utility that is subject to this regulatory jurisdiction. It must comply with FERC's orders, including the Guidance Order. It has no authority to override or modify the

Guidance Order. To the extent that NERC was dissatisfied with the ambit of its role in relation to ISO/RTO recovery of costs to members, it had the ability to seek rehearing of the Guidance Order. NERC, however, did not seek rehearing and the statutory time for doing so is well past. Therefore, the proposed changes to the ROP that are inconsistent with the Guidance Order represent a collateral attack on that order.¹⁸

C. The Right to Make a Section 205 Filing Belongs Solely to the Utility – Here, an ISO or RTO – Seeking Rate Recovery

As recognized by the U.S. Courts of Appeals, Section 205 “gives a utility the right to file rates and terms for services rendered with its assets,”¹⁹ and this right is exclusive to the utility itself. Indeed, under Section 205, the Commission “plays ‘an essentially passive and reactive’ role”²⁰ whereby it “can reject [a filing] only if it finds that the changes proposed by the public utility are not ‘just and reasonable.’”²¹ As a result, even if an intervenor develops an alternate proposal, the Commission must accept a utility’s Section 205 filing if it is just and reasonable.²²

The courts have also held that FERC may not interfere with the utility’s exercise of its Section 205 rights. As stated in *Atlantic City*:

The courts have repeatedly held that FERC has no power to force public utilities to file particular rates unless it first finds the existing filed rates unlawful. See *Pub. Serv. Comm'n v. FERC*, 275 U.S. App. D.C. 286, 866 F.2d 487, 488-89 (D.C. Cir. 1989).... Nor may FERC prohibit public utilities from filing changes in the first instance.²³

¹⁸ See, e.g., *Tennessee Gas Pipeline Co.*, 105 FERC ¶ 61,120 at P 55 (2003).

¹⁹ *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (“*Atlantic City*”).

²⁰ *Id.* at 10 (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984)).

²¹ *Id.* at 9.

²² *Cf. Southern California Edison Co., et al.*, 73 FERC ¶ 61,219 at 61,608 n.73 (1995) (“Having found the Plan to be just and reasonable, there is no need to consider in any detail the alternative plans proposed by the Joint Protesters.”) (citing *Cities of Bethany* at 1136).

²³ *Atlantic City*, at 10.

As indicated in the Guidance Order and the PJM Assignment Order, the Commission recognizes that ISOs and RTOs have the right, subject to compliance with the limited mechanisms specified in the Guidance Order, to make a Section 205 filing to seek to recover the costs of ERO penalties from their customers, which includes entities not registered with NERC or registered incorrectly at NERC at the time a reliability violation occurs. Under the *Atlantic City* order discussed above, if even FERC may not interfere with the exercise of a Section 205 filing right, certainly a FERC-regulated entity such as NERC may not restrict or deny – directly or indirectly, through provisions of its ROP or otherwise – the right of ISOs/RTOs to make such filings.

V. COMMENTS

A. Proposed Section 5.11

The IRC objects strongly to the proposed addition of Section 5.11, and associated provisions, to the ROP's Appendix 4C. Far from serving as a mere streamlining of the intervention process, much of the content of this section is in direct conflict with – and, if filed with FERC, impermissibly collaterally attacks – the Guidance Order and related orders regarding the recovery from Contributing Entities of the costs of penalties imposed on ISOs and RTOs by NERC, its Regional Entities or FERC. Moreover, the proposed language in numerous instances is in conflict with the legal framework outlined in the previous section, because it exceeds the scope of the statutory authority of NERC, and unlawfully seeks to impede the Section 205 filing rights of the ISOs and RTOs.²⁴

²⁴ In addition to being legally impermissible as outlined in these comments, in numerous meetings and correspondence with NERC staff over the past several months, ISO and RTO representatives have stated that these proposed procedures are also unreasonably burdensome and pointless. Accordingly, the IRC will not repeat those specific observations here.

The discussion below explains why particular provisions of Section 5.11 are legally impermissible and are unacceptable to the IRC under those authorities.

1. Proposed Section 5.11 Improperly Attempts to Limit Penalty Allocations by RTOs and ISOs, and Associated Participation in Enforcement Actions, to Registered Entities

Proposed Section 5.11 – in the November 7 Posting – states that “an ISO/RTO may have authority to allocate, pursuant to a proceeding under Section 205 of the Federal Power Act, some or all of a monetary penalty imposed on the ISO/RTO for violation of a Reliability Standard, *to another Registered Entity(ies)*.”²⁵ Proposed Section 5.11.1 sets up as a prerequisite to the ISO/RTO allocation mechanism (and to participation by the targeted entity in the enforcement proceeding) that the entity be included in a “Public Notification List” (“PNL”), and notified as specified in Section 5.11.2. The PNL is to be formulated to include only Registered Entities.²⁶ Indeed, *the entirety of Section 5.11*, as contained in the November 7 Posting, assumes that an ISO/RTO’s Section 205 filing will attempt to allocate penalties solely to Registered Entities.

As the ISOs/RTOs pointed out in numerous communications and meetings with NERC staff, the limitation to Registered Entities is objectionable from numerous perspectives,²⁷ including:

- The limitation contravenes Commission orders, including the PJM Assignment Order, which made clear – as discussed above – that an ISO/RTO Section 205 filing may seek to assign costs to non-Registered Entities. Moreover, the Guidance Order contains no such limitation, and it is beyond NERC’s authority under FPA Section 215 to attempt to add to FERC’s requirements.

²⁵ Emphasis added.

²⁶ Section 5.11.1(1) states that “The ISO/RTO shall provide to NERC a list of the *Registered Entities* to which the ISO/RTO contends it has authority to allocate all or a part of any monetary penalty....” (emphasis added).

²⁷ This issue was the subject of considerable discussion among NERC and IRC representatives. The issue initially appeared to be resolved in favor of no limitation, as evidenced by the absence of such a limitation in the draft that proceeded the November 7 Posting.

- As a corollary, the limitation would represent an *ultra vires* attempt by NERC to impinge on ISO/RTO Section 205 rights, in that a bar to participation in an enforcement proceeding by a non-Registered Entity would deprive the ISO/RTO of the ability to meet the prerequisites under the Guidance Order (and the ISO's/RTO's own implementing tariff provisions) for a Section 205 filing where a non-Registered Entity was responsible, in whole in part, for a violation.
- An entity's registration status with NERC does not have any statutory, regulatory or logical relation to whether an ISO or RTO can pass through a penalty for causing an ISO or RTO to violate a standard. Although NERC or a Regional Entity may correct the failure to register an entity or adjust an entity's incorrect registration prospectively, that correction does not eliminate the contribution that entity already made to the past reliability violation that is the basis of assigning penalty costs to that entity.

While the November 22 Posting appears to retract this limitation, it does so only for an interim period, with NERC “emphasiz[ing] that whether the procedures specified in proposed new Section 5.11 should be available only where the ISO/RTO seeks to allocate all or a portion of the penalty to one or more specified other Registered Entity(ies), or should be available where the ISO/RTO seeks to allocate all or a portion of the penalty to one or more specified other entity(ies) (whether Registered Entity(ies) or not), *remains an open issue.*”²⁸ NERC then states that it “seeks comments” on this issue.

The language of the PJM Assignment Order makes abundantly clear that these procedures may *not* be limited to Registered Entities. Therefore, NERC is incorrect – and is flouting Commission orders – to assert that there remains an “open issue” on that point. Any comments that may be submitted to the contrary cannot change the fact that this issue has already been decided by the Commission.

²⁸ See Notice of Revisions to Proposed New Sections 1.1.24 and 5.11 of Appendix 4C of the NERC Rules of Procedure, as Originally Posted for Comment on November 7, 2011, posted on the NERC website at <http://www.nerc.com/files/NoticeofRevisionstoProposedChangesApp4c-FinalPosted112211.pdf> (emphasis added).

2. Proposed Section 5.11 Would Impermissibly Establish NERC as a Gatekeeper to the Exercise by ISOs and RTOs of Their Section 205 Rights

Proposed Section 5.11 would impermissibly establish NERC, rather than FERC, as the “gatekeeper” to the exercise by ISOs and RTOs of their Section 205 rights.

a. The PNL Serves No Purpose, and Is an Impermissible Hurdle to ISO/RTO Exercise of Section 205 Rights

As noted above, proposed Section 5.11 would establish – as a new prerequisite to enforcement proceeding participation by entities identified by RTOs and ISOs as contributing to the actions or omissions that are the subject of the Notice of Possible Violation – the inclusion of the entity on a PNL, which must be maintained by the pertinent ISO or RTO. The use of the PNL as a threshold “hurdle” would impermissibly establish NERC as a gatekeeper to the exercise by ISOs and RTOs of their Section 205 rights. This proposal is objectionable to the IRC from many perspectives, including:

- The PNL serves no purpose, as all that is relevant under the Guidance Order and related orders for participation in enforcement proceedings is that the entity be properly *notified* so that its due process rights will be protected.
- FERC has assigned the obligation to provide that notification to the relevant ISO/RTO – not to NERC.
- The Guidance Order and PJM Hearing Order make clear that FERC, not NERC, controls whether a third party may intervene in a NERC enforcement proceeding, and that all that is required to satisfy FERC is notification by the ISO/RTO to that third party. Thus, the attempt to establish the PNL hurdle contravenes the orders of FERC and is beyond the scope of NERC authorities under Section 215. Notably, the FERC did not require compilation or use of any such list in the context of the matter described in the PJM Hearing Order.
- Proposed Section 5.11.2²⁹ makes the absence of the entity from the PNL a basis for denying the request for participation in the proceeding, except where NERC finds the participation appropriate due to “extraordinary circumstances.” Again, NERC’s intent (as confirmed by “verification” of “extraordinary circumstances”

²⁹ See subsection (6) on page 36 of the markup.

referenced in proposed Section 5.11.3(i)) to supplement or vary the terms of FERC orders, or act as some sort of intermediate appellate body, regarding exercise of Section 205 rights, is *ultra vires* and an impermissible obstruction to that exercise.

b. Other Provisions of Proposed Section 5.11 Similarly Impede the Exercise of Section 205 Rights and Are *Ultra Vires*

Proposed Section 5.11 is also replete with other impermissible attempts to make NERC a gatekeeper, which would expand NERC's role beyond the scope of its authority under Section 215, impinge on ISO/RTO Section 205 rights, and conflict with governing Commission orders.

These objectionable provisions include:

- Proposed Section 5.11.2³⁰ would require the ISO/RTO to state its basis for allocating the penalty to the specified entities, including copies of tariffs, agreements, orders, or governance documents. As confirmed and compounded by the statement in Section 5.11.3(ii) that NERC will “verify” that the ISO/RTO has the “authority” to allocate penalties, NERC is seeking to be the judge of whether the ISO/RTO may pursue a Section 205 filing to allocate the penalty. This role would be totally beyond the jurisdiction or authorities of NERC, and is a subject matter entirely committed to FERC under the Federal Power Act. Moreover, the pertinent tariffs, agreements, and orders are a matter of public record, and NERC is already aware that several FERC orders clearly state that ISOs and RTOs have been granted such rights.
- Another bar that NERC can erect to an exercise by an ISO or RTO of its Section 205 rights is a NERC finding under proposed Section 5.11.3 that there was not “timely delivery of notice” by the ISO or RTO to the targeted entity.
- More generally, Section 215 of the FPA and FERC's implementing regulations are clear³¹ that NERC must provide for due process in its enforcement procedures, subject to FERC's oversight. FERC's Guidance Order provides for the due process rights of both ISOs/RTOs and potential assignees. NERC has no authority to subtract from the rights of ISOs/RTOs.

³⁰ See subsection (4) on page 36 of the markup.

³¹ See, e.g., references to “notice and opportunity for a hearing” in the enforcement provisions of Section 215(e) (16 U.S.C. § 824o(e) (2010)) and 18 C.F.R. § 39.7 (2011).

c. NERC Apparently Seeks to Obstruct or Supplant FERC as the Adjudicator and Regulator of Utility Rate Recovery Issues

As a corollary to, or summation of, the comments contained in the preceding two subsections, the IRC regards proposed Section 5.11 as an impermissible attempt by NERC to obstruct or supplant FERC as the adjudicatory authority and regulator of utility rate recovery issues. NERC essentially proposes to grant or reject interventions in enforcement proceedings, thus usurping FERC's role as set forth in the Guidance Order. This would require ISOs and RTOs to seek appellate relief from FERC simply to be able to exercise their Section 205 rights – since, as discussed above, without the opportunity for participation by a Contributing Entity in a NERC enforcement proceeding and a root cause determination at the conclusion of that proceeding, an ISO/RTO cannot pursue rate recovery of penalty costs from a Contributing Entity.

The legal framework discussed in Section IV is clear: NERC and Regional Entities have no such role as adjudicator or regulator of rate filings. Instead, their permitted role – as demonstrated in the PJM Hearing Order proceeding – is (like any other FERC-regulated entity) to protest a petition by an ISO, RTO or Contributing Entity for a Contributing Entity's intervention in the NERC proceeding.

d. Other Provisions of Proposed Section 5.11 and the Revised ROP Are Objectionable

The revised ROP would deprive RTOs and ISOs of their discretion as to the conditions under which they would be willing to enter into a settlement of the enforcement proceeding. Specifically, proposed Section 5.11.6 would require any settlements as between NERC and the ISO/RTO to be agreed to by the Contributing Entity as well. This represents an additional and ill-founded interference in the Section 205 rights of the ISOs/RTOs, since the appropriate amount of the overall penalty generally will not vary based on whether there is a Contributing

Entity that was wholly or partly responsible for the violation. The ISO or RTO should be free to make a Section 205 filing to assign costs based on the amount specified in a bilateral settlement with NERC.

B. Other Proposed ROP Changes

1. ISO/RTO Definition

The definition of “ISO/RTO” proposed as new Section 1.1.12 of Appendix 4C is inaccurate as a legal matter, and should simply refer to entities that have been recognized as either an ISO or RTO by FERC in accordance with its regulations, and ERCOT, as well.

2. Modifications to ROP Section 318

In the November 7 Posting, NERC states that it is proposing to eliminate the reference to the ISO/RTO Council in Section 318. NERC explains that “[a]lthough NERC strives to maintain close working relationships with the ISO/RTO Council and with industry associations and other, similar organizations, based on experience NERC has not found it necessary to work specifically with the ISO/RTO Council to coordinate wholesale electric business standards and market protocols with NERC reliability standards.” The new language for Section 318 would read:

NERC shall, through a memorandum of understanding, maintain a close working relationship with the North American Energy Standards Board ~~and ISO/RTO Council~~ to ensure effective coordination of wholesale electric business practice standards and market protocols with the NERC reliability standards.”

The IRC believes that eliminating the reference to an MOU with the ISO/RTO Council may be appropriate in light of the fact that NERC and NAESB have now established formal ISO/RTO sectors within their respective governance structures. However, NERC’s edits miss the mark by failing to recognize the importance of NERC’s ensuring, through taking regular steps with the ISO/RTO Council, that Reliability Standards are developed in close coordination with ISO/RTO market protocols. This work will become more important as NERC and the

industry at large gain more experience with how Reliability Standards are being enforced by the ERO.

The edits to Section 318 result in language which erroneously suggests that NERC's working relationship with NAESB is sufficient to ensure effective coordination of Standards with market protocols. NAESB is not capable of taking on this role for ISO/RTO market protocols. Indeed, the purpose for the establishment of the MOU was to acknowledge the critical, yet differing, roles of the three entities: NERC – to ensure reliability; NAESB – to develop business practices; and the ISO/RTO Council to promulgate and administer wholesale market protocols. These functions are no less important today, and close cooperation among these three entities remains critical to ensuring the integrity of the bulk electric system.

The Commission has previously noted that questions regarding a Standard's impact on competition are best handled on a case-by-case basis, and that in such instances, FERC will not “defer to the ERO with respect to the effect of a proposed Reliability Standard or a proposed modification to a Reliability Standard on competition.” *See* Order 672-A at P29. In short, the Commission is obligated to undertake a *de novo* review on such matters. As a result, it is particularly important that the ROP specify the steps NERC will take to ensure that any issues regarding potential market or competitive impacts are identified early on in its standard development process.

The need to maintain a close working relationship around such issues also supports major efficiencies in the NERC Standards Development process. It would help proper prioritization of the need for new or modified Reliability Standards. Second, it avoids the expenditure of resources in developing Reliability Standards that contain inconsistencies with ISO/RTO market protocols.

In light of these facts, the IRC proposes that Section 318 be revised as follows:

NERC shall, ~~through a memorandum of understanding,~~ maintain a close working relationship with the North American Energy Standards Board and ISO/RTO Council to ensure effective coordination of wholesale electric business practice standards and market protocols with the NERC reliability standards.

VI. CONCLUSION

Wherefore, for the foregoing reasons, the IRC requests that NERC withdraw proposed Section 5.11, and revise the ISO/RTO definition and ROP Section 318 as requested herein.

Respectfully submitted,

/s/ Craig Glazer

Craig Glazer
Vice President – Federal Government Policy
Steven R. Pincus
Assistant General Counsel
PJM Interconnection, L.L.C.
1200 G Street, N.W. Suite 600
Washington, D.C. 20005

/s/ Stephen G. Kozey

Stephen G. Kozey
Vice President, General Counsel, and Secretary
**Midwest Independent Transmission System
Operator, Inc.**
P.O. Box 4202
Carmel, Indiana 46082-4202

/s/ Anthony Ivancovich

Anthony Ivancovich
Assistant General Counsel-Regulatory
**California Independent System Operator
Corporation**
151 Blue Ravine Road
Folsom, California 95630

/s/ Raymond W. Hepper

Raymond W. Hepper
Vice President, General
Counsel, and Secretary
Theodore J. Paradise
Senior Regulatory Counsel
ISO New England Inc.
One Sullivan Road
Holyoke, Massachusetts 01040

/s/ Brian Rivard

Brian Rivard
Manager, Regulatory Affairs
**Ontario's Independent Electricity System
Operator**
655 Bay Street, Suite 410
Toronto, Ontario
M5G 2K4

/s/ Carl F. Patka

Carl F. Patka
Assistant General Counsel
Raymond Stalter
Director, Regulatory Affairs
**New York Independent System Operator,
Inc.**
10 Krey Blvd
Rensselaer, New York 12144

/s/ Heather Starnes

Heather Starnes
Manager, Regulatory Policy
Southwest Power Pool
415 North McKinley
#140 Plaza West
Little Rock, Arkansas 72205

/s/ Matthew Morais

Matthew Morais
Assistant General Counsel
Electric Reliability Council of Texas, Inc.
2705 West Lake Drive
Taylor, Texas 76574

Date: December 22, 2011