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July 9, 2010

VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

**Re: North American Electric Reliability Corporation,
Docket No. RR10-11-000;
Motion to Intervene and Comments of ISO New England Inc. and Electric
Reliability Council of Texas, Inc.**

Dear Secretary Bose:

Transmitted electronically for filing in the referenced docket is the Motion to Intervene and Comments of ISO New England Inc. and Electric Reliability Council of Texas, Inc.

If there are any questions concerning this filing, please call me at (202) 661-2205.

Very truly yours,

/s/ Howard H. Shafferman

Howard H. Shafferman
Counsel for
ISO New England Inc.

Enclosure

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

**North American Electric Reliability
Corporation**)

Docket No. RR10-11-000

**MOTION TO INTERVENE AND COMMENTS OF
ISO NEW ENGLAND INC.**

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”), 18 C.F.R. §§ 385.212 and 214 (2010), ISO New England Inc. (“ISO-NE”) and Electric Reliability Council of Texas, Inc. (“ERCOT”) (collectively, the “Filing Parties”) move to intervene in the above-captioned proceeding and submit the comments provided below.

I. COMMUNICATIONS

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II. BACKGROUND

On June 9, 2010, as supplemented on June 17, 2010, the North American Electric Reliability Corporation (“NERC”) submitted, as the nation’s Electric Reliability Organization, a revised *pro forma* Delegation Agreement, revised Delegation Agreements with the eight Regional Entities, and amendments to the NERC Rules of Procedure (the “ROP”) (the “June Revisions”).¹

III. IDENTITY OF ISO-NE AND ERCOT

ISO-NE is the private, non-profit entity that serves as the regional transmission organization (“RTO”) for New England. ISO-NE operates the New England bulk power system and administers New England’s organized wholesale electricity markets pursuant to the ISO

¹ Capitalized terms not otherwise defined in these comments have the meanings assigned thereto in the ROP.

New England Inc. Transmission, Markets and Services Tariff and the Transmission Operating Agreement with the New England Participating Transmission Owners. In its capacity as an RTO, ISO-NE has the responsibility to protect the short-term reliability of its Balancing Authority Area and to operate the system according to Reliability Standards established by NPCC and NERC. As the Balancing Authority for the New England region (except for the Maine Public Service Company territory in Northern Maine, which is interconnected to New Brunswick), ISO-NE plays a critical role in ensuring that the region's bulk-power system functions in a reliable manner.

ERCOT is the Independent System Operator responsible for ensuring the reliability of the bulk electric system that serves 85% of the electrical load within the State of Texas. ERCOT is approved by, and subject to the oversight of, the Public Utility Commission of Texas in accordance with laws adopted by the Texas Legislature. It is a single point of control, intra-state Interconnection organized on an Interconnection-wide basis and utilizes competitive capacity and energy markets to maintain the reliability of the ERCOT grid. ERCOT's membership consists of Municipal Utilities, Rural Electric Cooperatives and River Authorities, Investor Owned Utilities, Independent Power Producers, Power Marketers, Retail Electric Providers and Customers.

IV. MOTION TO INTERVENE

ISO-NE and ERCOT move to intervene as parties to this proceeding. The outcome of this proceeding could clearly affect the Filing Parties' interests, due to their respective roles as Balancing Authorities. No other party can adequately represent their interests or their viewpoint.

V. COMMENTS

A. Introduction and Summary

By way of regulatory context, under 18 C.F.R. § 39.10(a) and (c), in order for the Commission to approve a change to NERC and Regional Entity rules, NERC must: (i) provide an explanation of the basis and purpose for the rule change; (ii) include a description of the proceedings to develop its change, and (iii) show that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of 18 C.F.R. § 39.3.²

The Filing Parties have a number of comments on the June Revisions, stemming from its concern that certain of the June Revisions have not met the requirements of Section 39.10, in that they: (i) have not been explained and justified sufficiently, (ii) have not received or do not reflect sufficient stakeholder input; and/or (iii) do not meet the standards required for Commission acceptance.

The June Revisions have two primary components: (1) a revised *pro forma* regional Delegation Agreement (“RDA”) and revised RDAs with the eight Regional Entities; and (2) revisions to the ROP. The June 9, 2010 filing letter for the June Revisions (the “Filing Letter”) summarily describes these revisions (in both components) as motivated by “issues identified in NERC’s *Three-Year ERO Assessment Report*,” which NERC filed with the Commission on July

² 18 C.F.R. § 39.3 states that for an entity to be certified as the ERO, it must have established rules that: (i) Assure its independence of users, owners and operators of the Bulk- Power System while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any Electric Reliability Organization committee or subordinate organizational structure; (ii) Allocate equitably reasonable dues, fees and charges among end users for all activities under this part; (iii) Provide fair and impartial procedures for enforcement of Reliability Standards through the imposition of penalties in accordance with § 39.7, including limitations on activities, functions, operations, or other appropriate sanctions or penalties; (iv) Provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing Reliability Standards, and otherwise exercising its duties; and (v) Provide appropriate steps, after certification by the Commission as the Electric Reliability Organization, to gain recognition in Canada and Mexico.

20, 2009.³ The Filing Parties take no position on the RDA component of the June Revisions, except for the limited comment areas noted herein. Notably, though, the Filing Letter's discussion of a number of the ROP changes included in the June Revision lacks an adequate explanation of the basis and purpose of the change in relation to the *Three-Year ERO Assessment Report* or to conform to RDA changes, or otherwise.

It is possible that NERC views the shortcuts taken in explaining whether and how it addressed stakeholder concerns about ROP changes as being appropriate in light of RDA-related exigencies. That is, NERC stated elsewhere – during the course of the development of ROP changes – that it did not

believe that the additional comments that would come from a further notice and comment procedure would warrant the delay such further posting would entail. The *current delegation agreements terminate in less than a year*, and it is important to continue the process of having the proposed improvements in the delegation agreements and the Rules of Procedure in place on a timely basis.⁴

The Filing Letter, however, does not explain the nexus between impending RDA renewal and the need to curtail notice and comment procedures for certain of the ROP changes; neither does the filing detail which RDA changes are *essential* for their timely renewal nor explain which ROP changes are necessary to effectuate those *essential* RDA changes. In short, there are some ROP changes which may not be necessary at this time, and in fact, would benefit from further development with NERC Membership.

³ NERC filed the report (hereinafter, the “*Three Year Assessment*”) with the Commission in Docket No. RR09-7; see Three Year Report at 3, 62. The *Three Year Assessment* is available at: http://www.nerc.com/files/NERC_3-year_Assessment_report_7-01-09.pdf.

⁴ See materials for NERC Board of Trustees Meeting (May 12, 2010), Agenda Item 7 (“Revised Delegation Agreements”), Supplemental Information Regarding Revised Delegation Agreements, at p. 5, available at: http://www.nerc.com/docs/bot/agenda_items/Agenda%20Item%207-complete.pdf (emphasis added).

In light of the foregoing, the Filing Parties’ comments focus on why certain of the changes to the RDA and ROP are inappropriate, inadequately justified, or premature. The comments also explain why if the Commission nevertheless elects to approve certain of these changes *at this time*, it should also direct NERC to make additional changes to the ROP.

Specifically, the Filing Parties’ comments express their views that:

- The content and interaction of the new defined terms “Possible Violation” and “Preliminary Screen” create confusion about the sequence of processes that NERC/Regional Entities will utilize, and the definitions’ interaction with existing language undercuts NERC’s action plan to separate event analysis from compliance investigations (Section V.B of these comments);
- The revised event analysis provisions in ROP Section 808 require greater specificity (Section V.C);
- The revised definition of Confirmed Violation, if accepted, requires conforming changes to ROP Sections 1506.1, 402.4 and ROP Appendix 4C, Section 8.0 to clarify provisions relating to the public disclosure of Confirmed Violations and settlements reached with respect to Alleged Violations (Section V.D);
- The Compliance Enforcement Authority’s discretion to limit participation by counsel and other representatives of Registered Entities in interviews of their employees undertaken by NERC or Regional Entities in compliance investigations is inappropriate (Section V.E); and
- Other conforming changes to the ROP are needed (Section V.F).

B. The Content and Interaction of the New Defined Terms “Possible Violation” and “Preliminary Screen” Create Confusion About the Sequence of Processes that NERC/Regional Entities Will Utilize, and the Definitions’ Interaction with Existing Language Undercuts NERC’s Action Plan to Separate Event Analysis from Compliance Investigation

1. Content and Interaction of New Definitions As Creating Process Confusion

The June Revisions provide definitions for two new terms – “Possible Violation” and its associated “Preliminary Screen” – and modify the existing definitions of “Alleged Violation”

and “Confirmed Violation.”⁵ Regrettably, the content and interaction of these definitions creates confusion about the processes – and sequencing of processes – that NERC and Regional Entities will utilize in the Compliance Monitoring and Enforcement Process.

The definition of Preliminary Screen is:

An initial evaluation of evidence indicating potential noncompliance with a Reliability Standard has occurred or is occurring, conducted by the Compliance Enforcement Authority for the purpose of determining whether a Possible Violation exists, and consisting of an evaluation of whether (1) the entity allegedly involved in the potential noncompliance is registered, and (2) the Reliability Standard requirement to which the evidence of potential noncompliance relates is applicable to the entity and is enforceable.

This definition is ambiguous within its own terms. The first portion of the definition refers to the screen as an “initial evaluation of evidence” regarding Reliability Standard noncompliance. However, the last part of the definition states that the evaluation “consist[s] of” what is essentially a more limited “jurisdictional” (rather than an evidentiary evaluation of whether noncompliance has occurred or is occurring) determination as to whether the entity is registered and subject to the Reliability Standard.

As a threshold matter, NERC should resolve that ambiguity. But that ambiguity leads to other process and sequencing concerns in relation to the Violation definitions. If, on the one hand, the Preliminary Screen is indeed a review of noncompliance evidence (rather than a jurisdictional check) that directly results in a finding of a Possible Violation,⁶ it is unclear what is left to be done to find a Possible Violation – defined as the identification of a possible failure

⁵ See ROP App. 4C at § 1.1.

⁶ See ROP App. 4C at § 5.1 (“...the Compliance Enforcement Authority shall perform a Preliminary Screen to determine whether there is a Possible Violation....If a Preliminary Screen results in an affirmative determination with respect to the above [jurisdictional] criteria, a Possible Violation exists.”).

to comply with a Reliability Standard. However, the definition of Possible Violation also suggests that a more thorough process – a compliance audit or investigation under Section 3.0 of Appendix 4C – would be used to make an identification of a Possible Violation (incidentally, an approach far fairer to Registered Entities). If, on the other hand, the Preliminary Screen is indeed a limited jurisdictional determination, it is hard to see why a positive finding under the screen should lead directly to a Notice of Possible Violation, as indicated in Section 5.1 of Appendix 4C.

2. Interaction of New/Modified Definitions with Existing Language As Undercutting NERC Action Plan Regarding Event Analysis

The interaction of the new and modified violation definitions with existing language of the Compliance Monitoring and Enforcement Process appendix to the revised ROP creates a number of concerns for the Filing Parties.

The existing language is in Appendix 4C, which states that a Compliance Investigation “may be initiated at any time by the [NERC or the Regional Entity] in response to a system disturbance....”⁷ Under this standard, and consistent with the new and modified “violation” definitions reflected in the June Revisions, it appears that NERC or the Regional Entity could classify any system disturbance as a Possible Violation and trigger a Compliance Investigation. This interaction creates at least three concerns.

First, administration of these provisions in that fashion would be inappropriate, since a system disturbance is simply a “fact or circumstance” and does not imply on its face any non-compliant conduct. Yet, if the provisions are administered in that fashion, a Registered Entity

⁷ See ROP Appendix 4C at § 3.4.

could be tagged with a Possible Violation just because it operated in the vicinity of a disturbance occurring on the system.

Second, administering these provisions in that fashion – to count each system disturbance as a Possible Violation, even in the absence of a full investigation of Registered Entity conduct – would exaggerate the extent to which Registered Entities may be failing to comply with the Reliability Standards, and could create a misleading impression of unreliability. Not every system disturbance represents the manifestation of a compliance violation, and many are simply the result of weather conditions. Others reflect nothing other than system perturbations that may occur within the parameters of “reliable operation.”⁸

Third, the interaction of these new and existing provisions to suggest that system disturbances will generally lead to a compliance investigation undercuts the *Three Year Assessment*'s stated plan to “[s]eparate event analyses from compliance violation investigations.” In the *Three Year Assessment*, one of the listed “specific NERC actions planned in response to stakeholder and Regional Entity comments and recommendations”⁹ was for NERC to “[s]eparate event analyses from compliance violation investigations [(“CVIs”)] to eliminate the prosecutorial presumption of violation aspects from event analyses.”¹⁰ In its *Three Year Assessment*, NERC agreed with commenters that:

it should consider developing more explicit procedures for the interface and coordination between event analyses and CVIs so as to keep open the exchange of information about an event that is

⁸ Section 215 of the Federal Power Act defines “reliable operation” as operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur *as a result of a sudden disturbance*, including a cybersecurity incident, or unanticipated failure of system elements.” (emphasis added)

⁹ *Three Year Assessment* at 4 (referring to Appendix A).

¹⁰ *Three Year Assessment*, App. A at 10.

essential for improving reliability through feedback to the industry.¹¹

The specific action to be taken by NERC was described in greater detail as follows:

Review and expand existing procedures to clarify the interface between event analyses and [CVIs] with the objective of preserving and promoting, in event analyses, the open exchange of information necessary for feedback to the industry for purposes of reliability improvement.¹²

Notably, only several weeks ago, NERC formally acted on this need, and commenced a process to better administer its event analysis program, and the Filing Parties applaud this effort.

3. Conclusion

The Commission should remand these aspects of the ROP¹³ (and the associated changes to definitions in the RDA) to NERC to make changes that would resolve the foregoing concerns. Finally, and in related fashion to the concerns described above, NERC should correct, or otherwise explain, uses of the terms “possible,” “alleged” and “confirmed” violation that are not capitalized in the body of the ROP, as such terms are capitalized and defined in Appendix 4C.

C. The Revised Event Analysis Provisions in ROP Section 808 Require Greater Specificity

The June Revisions, with respect to NERC/Regional Entity analysis of “Off-Normal Events, Potential System Vulnerabilities, and System Performance” under ROP Section 808, state broadly that users, owners and operators must provide such information “as is necessary to enable NERC and the applicable regional entities to carry out their responsibilities under this section.” The Filing Parties desire to be prompt and responsive to information requests that

¹¹ *Three Year Assessment*, Att. 2 at 37-38.

¹² *Three Year Assessment*, App. A at 11.

¹³ The corresponding definitions utilized in the RDAs should be remanded, as well.

support such ERO analyses, but are concerned that the non-specific language of Section 808 – standing alone – will make it difficult to meet expectations of ERO personnel making such requests.

That is, the language of Section 808 does not specify any criteria or procedure by which NERC or Regional Entities will request information and Registered Entities will supply it.¹⁴ The provisions of ROP Section 1600 demonstrate that it is possible to develop more detailed procedures for information requests and responses. Indeed, the very nature of a document entitled “Rules of Procedure” is that it contain actual procedures.

The Commission should remand Section 808 to NERC for additional work that can provide an appropriate level of detail in the criteria and procedures for data requests. Perhaps NERC’s event analysis efforts, described above, could produce these criteria and procedures.

D. The Revised Definition of Confirmed Violation, If Accepted, Requires Conforming Changes to ROP Sections 1506.1, 402.4 and ROP Appendix 4C, Section 8.0 to Clarify Provisions Relating to the Public Disclosure of Confirmed Violations and Settlements Reached With Respect to Alleged Violations

The June Revisions include a revised definition of Confirmed Violation.¹⁵ The pertinent revisions broaden the definition of Confirmed Violation to include violations to which an entity has admitted in a settlement agreement. Under the ROP, as currently approved and as revised, Registered Entities are permitted to achieve settlement with NERC without admitting to a violation,¹⁶ and where that occurs, NERC would presumably still refer to such enforcement matters as Alleged Violations. Because NERC *must disclose publicly* such Alleged Violations as

¹⁴ ROP Appendix 4C § 3.4.1 simply states that “[t]he Registered Entity provides the required information to the Compliance Enforcement Authority in the format as specified in the request.”

¹⁵ See ROP App. 4C at § 1.1.9.

¹⁶ See ROP App. 4C at § 5.6.

part of filing its Notices of Penalty, NERC should be required to make at least three conforming changes to the ROP.

The first conforming change would be to ROP Section 1506.1, which currently provides:

Confirmed Violations — Nothing in this Section 1500 shall prohibit the disclosure of a violation at the point when the matter is filed with an appropriate governmental authority as a notice of penalty, the “violator” admits to the violation, *or the alleged violator and NERC or the regional entity reach a settlement regarding the violation.* (emphasis added)

To avoid confusion, NERC should modify the heading of Section 1506.1 to read:

“Confirmed Violations and Settlements.” This would ensure consistency of Section 1506.1 with the revised definition of Confirmed Violation, make clear that NERC will make all settlements public, and signify that a settlement need not be premised on an admission of violations.

Second, NERC should make changes (beyond those proposed in the June Revisions) to ROP Section 402.4. Pursuant to the June Revisions, that section provides: “NERC shall disclose all confirmed violations and maintain as confidential **possible violations and** alleged violations, according to the reporting and disclosure process in **Appendix 4C.**” (new language indicated by boldfaced font). This provision should be clarified to specify that NERC must disclose not only all confirmed violations but also all settlement agreements.

Third, because NERC proposes to make reference in ROP Section 404.2 to disclosure of “possible and alleged” violations in accordance with Appendix 4C, Section 8.0 of Appendix 4C also requires conforming changes. Pursuant to the June Revisions, that section provides: “NERC will publicly post on its Web site each Notice of Penalty, *with the identity of the violator*, together with any statement submitted by the Registered Entity, when NERC files the Notice of Penalty with FERC.” (emphasis added). Because Notices of Penalty are issued in connection with settlement agreements under which the Registered Entity has not admitted a

violation,¹⁷ the identity-disclosure provision of Section 8.0 should be revised to mandate disclosure of the identity of such settling entities.

E. The Compliance Enforcement Authority’s Discretion to Limit Participation by Counsel and Other Representatives of Registered Entities in Interviews of Their Employees Undertaken by NERC or Regional Entities in Compliance Investigations Creates Concerns and Should be Eliminated

The June Revisions, in Section 3.4.1 of Appendix 4C,¹⁸ grant the Compliance Enforcement Authority the discretion to determine whether the Registered Entity’s representatives (presumably including its corporate counsel) are permitted to be present when an employee of the Registered Entity is being interviewed or is giving testimony in the course of a Compliance Investigation. For the reasons set forth below, the Filing Parties are concerned about this discretion, and believe that this discretion should be eliminated so that company counsel are permitted to be present in these situations.

In the case of Reliability Standards, it is the company – that is, the NERC Registered Entity and not the individual employee – that is subject to violation findings and enforcement/penalty actions. Interviewed employees are acting in the capacity of employee, and not as unaffiliated individuals. Thus, in interviews, an employee will likely be viewed as speaking for the company, and could provide evidence that can be used in an investigation or enforcement action against the corporate person of the company.

Section 555(b) of the Administrative Procedure Act allows for a person to be accompanied and represented by counsel when compelled to appear before an agency. By analogy, the ERO, which was the creation of federal legislation that endowed it with

¹⁷ See ROP App. 4C, at § 5.9.

¹⁸ Section 3.4.1 states, in pertinent part: “The Compliance Enforcement Authority shall determine in each case (i) whether representatives of the Registered Entity shall be allowed to be present when an interview is taking place or testimony is being taken....”

enforcement powers, should be held to a similar standard and the ROP should affirmatively permit counsel for the corporate “person” (the company) to be present in these interviews, especially since the employee will be deemed to be speaking for the company in such circumstances.

F. Other Conforming Changes

1. ROP Section 401.11.3

The June Revisions include a new Section 401.11.3 in the ROP. This provision states that NERC will post Notices of Penalty containing “sufficient facts to enable owners, operators and users of the bulk power system to evaluate whether they have engaged in or are engaging in similar activities.” Because the underlying basis for the Possible or Alleged Violation will be based on the specific facts of the case, and because Notices of Penalty involving settlement agreements may contain a relatively high-level description of the facts, or a high-level description of the relationship between those facts and the alleged violation,¹⁹ the proposed language sets an unduly high expectation as to the utility of the Notices of Penalty.

That is, a review of the Notices of Penalty is unlikely to “enable” a Registered Entity to determine if it is engaged in similar activities. A more appropriate wording would be that Notices of Penalty can “assist” entities in determining if they are engaged in similar activities and “alert” entities as to the types of violations taking place. In fact, through its burgeoning (and important) work effort in publishing Compliance Analysis Reports for the most highly-violated Standards,²⁰ NERC has implicitly recognized that the Notices of Penalty, in and of themselves,

¹⁹ See, e.g., Florida Blackout, *Order Approving Stipulation and Consent Agreement*, Docket No. IN08-5 (issued October 8, 2009) (Concurring Opinion, Spitzer (“I would have required that the Order identify with specificity the Reliability Standards alleged to have been violated in this matter and how the facts of this case apply to those Reliability Standards”)).

²⁰ See documents posted at <http://www.nerc.com/page.php?cid=3|329>.

do not provide sufficient detail to enable Registered Entities to determine if they have engaged in similar activities.

NERC is to be commended for the work it is doing to increase the transparency of its enforcement and settlement activities. The Commission should, nonetheless, require changes to Section 402.11.3 to more accurately describe the nature and value of Notice of Penalty disclosures.

2. ROP Section 401.12

The June Revisions also include a new Section 401.12 in the ROP, which states that “NERC compliance monitoring and enforcement program staff shall periodically review and analyze all reports of possible, alleged and confirmed violations to identify trends, chronic violators, and other pertinent reliability issues.”

To provide appropriate accountability, the Commission should require NERC to revise this section to establish the cycle, e.g., at least once every 12 months, under which CMEP staff will “review and analyze” reports. In addition, it would be appropriate to specify in this section that the purpose of “identifying trends, chronic violators, and other pertinent reliability issues” is to inform relevant NERC Committees of the manner in which Registered Entities are adhering to Standards and which Standards are being enforced so as to advise those Committees of actions that they may consider taking, and to advise industry, Regional Entities, and Applicable Governmental Authorities on potential risks to reliability.

3. ROP Section 403.10

The June Revisions propose to strike the phrase, currently included in ROP Section 403.10, stating that information requests and submissions will be “in accordance with established procedures of NERC and the Regional Entity.” The Filing Letter explains the deletion as follows:

In carrying out compliance monitoring and enforcement processes, NERC and Regional Entity compliance staffs need to be able to request and receive information from Registered Entities without necessarily having to base the request on an “established procedure.”²¹

For the reasons discussed in subsection V.C of these comments, the Filing Parties disagree with that assertion, and believes the development and use of understandable criteria and procedures is crucial in order for the Filing Parties to meet their goal of responsiveness in the information submittal process. This is especially true because of the expansive scope of circumstances under which NERC may classify events as Possible Violations that give rise to compliance investigations.

²¹ Filing Letter at 69.

VI. CONCLUSION

For the foregoing reasons, the Filing Parties respectfully request that the Commission grant their motion to intervene, and rule in a manner consistent with the Filing Parties' comments herein.

Respectfully submitted,

/s/ Theodore J. Paradise

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 9th day of July, 2010.

/s/ Pamela S. Higgins

Pamela S. Higgins

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