

**Before the
UNITED STATES DEPARTMENT OF ENERGY**

Interstate Electric Transmission System;)
Electric Reliability Issues)
)

**COMMENTS OF NEBRASKA PUBLIC POWER DISTRICT
ON
NOTICE OF INQUIRY**

I. Background

On November 15, 2000, the Secretary of Energy issued a Notice of Inquiry, soliciting comments on whether the Department of Energy (DOE) should exercise its authority under section 403 of the Department of Energy Organization Act, 42 U.S.C. 7173, to initiate a rulemaking proceeding at the Federal Energy Regulatory Commission (FERC). 65 Fed. Reg. 69753 (November 20, 2000). The subject-matter of the contemplated rulemaking proceeding would be the establishment of mandatory reliability standards for electric utilities. In addition, the November 15, 2000 Notice solicited responses to seven specific questions relating to the reliability of the U.S. electric utility industry. It also encouraged commenters to discuss, comment on, and make suggestions on other electric reliability issues that may be relevant to DOE's consideration of a rulemaking. *Id.* at 69754.

Nebraska Public Power District (NPPD) is submitting these comments in response to the Department's Notice of Inquiry.

NPPD is a public corporation and political subdivision of the State of Nebraska, formed for the purpose of providing electrical generation, transmission and distribution service to wholesale and retail customers throughout Nebraska. It serves approximately 80,000 retail customers in 97 municipalities and other communities and supplies at wholesale the total requirements of 73 municipalities, public power districts and cooperatives. Under Nebraska law, all significant actions by the District, *e.g.*, the setting of its rates, are taken pursuant to votes of its eleven-member Board of Directors. The Board's members are popularly elected by the residents that NPPD serves.

Nebraska is unique among all of the states in that all of its electric utilities are owned by public agencies or cooperatives. It has no investor-owned utilities and no public utilities within the meaning of section 201(e) of the Federal Power Act. The entities that provide electrical generation, transmission and distribution in Nebraska are governed by people elected by the customers they serve. None of these entities, including NPPD, is subject to the general jurisdiction of the FERC. Under section 201(f) of the Federal Power Act, 16 U.S.C. 824(f), the provisions of the Federal Power Act, including FERC's authority to issue and enforce rules of general applicability, do not apply to the United States, a State or any political subdivision of a state, or any agency, authority or instrumentality of any one or more of the foregoing. . . .

Nevertheless, the electrical systems of non-jurisdictional entities must be taken into account

in dealing with the reliability of the U.S. electrical grid. NPPD, for example, owns, operates and maintains approximately 4,500 miles of transmission lines rated at 115 kV or higher. It is interconnected with numerous other electric utilities, both investor-owned utilities and public-power and cooperative utilities. It is used extensively by market participants to support regional power transfers that create parallel flows over the NPPD system.

Unlike other areas of the country, the Upper Midwest, where NPPD is located, has few exclusive electric service territories. The transmission lines of many utilities criss-cross the region. The Upper Midwest is also unique in that a large proportion of the transmission grid is owned by federal, municipal, state-owned and cooperative utilities financed by the Rural Utilities Service; all of these utilities are exempt from FERC's general jurisdiction under sections 205 and 206 of the Federal Power Act. Also, the transmission facilities of Canadian utilities are interconnected with those of U.S. utilities and are integral to coordinated operation of the electrical system.

With this background, we turn to the specific questions posed in the Department's Notice of Inquiry.

II. The Department's Questions

1. Is the existing arrangement of voluntary compliance with industry reliability rules sufficient to ensure reliability of the bulk power transmission system? If not, why not, and has reliability been jeopardized by violations of the existing bulk power reliability standards?

As the Department is aware, the U.S. electric industry is now undergoing a massive shift from an industry that is predominately regulated by the rules and precedents of state and federal regulatory agencies to an industry that is competitive in nature. This change is most noticeable at the wholesale level. FERC's initiatives, including under Orders Nos. 888 and 889, have tended to produce a wholesale market that is competitive in character. As competition has taken hold, FERC has relaxed many of the traditional regulatory restraints on the marketing of bulk power. This change is particularly evident with respect to independent power producers who have been granted the right to sell their output at market-based, *i.e.*, unregulated, rates and power marketers, who have been granted similar rights with respect to their purchases and sales of bulk power.

NPPD believes that the advent of competitive wholesale markets that include participants who are not, and have never been, in the traditional electric utility business requires that attention be given to the imposition of mandatory reliability standards. In a competitive wholesale electric market, the pre-existing system of voluntary compliance with reliability rules, *i.e.*, the Operating and Planning Standards promulgated by the North American Electric Reliability Council (NERC) and administered by the ten Regional Reliability Councils, is no longer adequate to ensure the reliability of electric service to customers. As we have read in trade press reports concerning electric system operating events during the past few years, some entities participating in the market have chosen to ignore their obligation to comply with the NERC Standards at certain times. They have done so either to gain an economic advantage or to avoid financial losses. In other words, these entities have operated in their own economic self-interest, disregarding accepted industry standards, to the detriment and peril of all other users of the transmission system.

For these reasons, NPPD agrees with the conclusions of the Secretary's Task Force on Electric System Reliability^{1/} that, although the voluntary system has served the Nation well until now, more effective ways must be found to ensure reliability in the future.

¹. *Maintaining Reliability in a Competitive U.S. Electricity Industry (1998).*

2. *What can FERC do under existing authorities to address reliability concerns?*

Under section 202 of the Federal Power Act, 16 U.S.C. 824a, FERC can divide the country into districts for the adoption of *voluntary* standards for interconnection and coordination of bulk electrical facilities. FERC has also taken the position that it can also require jurisdictional public utilities, *i.e.*, investor-owned utilities that are connected to the interstate grid and cooperative utilities so connected that do not receive financing from the Rural Utilities Service, to adopt NERC Standards and publish them in tariffs filed under section 205 of the Federal Power Act. *See North American Electric Reliability Council*, 92 FERC 61,012 (2000). In doing so, however, FERC must remain within the confines of its statutory jurisdiction.^{2/} FERC has also asserted that it can require jurisdictional public utilities to become members of Regional Transmission Organizations (RTOs). As FERC pointed out in its Order No. 2000 on RTOs, large regional organizations are much more likely to have the wherewithal and the inclination to comply with NERC's Standards than individual utilities, power marketers and similar entities.

What FERC cannot do is to establish mandatory nation-wide reliability standards that are applicable to all of the Nation's electric utilities. It does not have the legal authority to do so. As we have pointed out, *supra*, FERC has no authority over the non-jurisdictional segment of the electric utility industry. That segment includes municipal utilities, state-owned utilities, Federal power marketing agencies, the Tennessee Valley Authority and utilities in Texas, Alaska and Hawaii that are not connected to the national grid.

For this reason, it seems pointless for DOE to attempt to initiate a rulemaking proceeding at FERC so that FERC can establish universal mandatory reliability standards. Under section 403 of the DOE Organization Act, the Secretary of Energy's authority to propose rulemaking action by FERC extends only to rules, regulations, and statements of policy of general applicability *with respect to any function within the jurisdiction of the Commission*. (Emphasis added.) NPPD respectfully urges the Department to continue working towards a legislative solution to the problem of improving compliance with electric reliability standards.

^{2/} *See Enron Power Marketing, Inc. v. Northern States Power Co.*, 176 F.3d 1099 (8th Cir. 1999), *cert. denied*,

3. If FERC has the authority to establish and enforce reliability standards, may FERC delegate such authority to a self-regulating reliability organization? Should it do so?

As we have noted, NPPD believes that FERC does not have the authority to establish and enforce reliability standards, except to a very limited extent that may prove unsatisfactory in light of broader national concerns.

Assuming, *arguendo*, that FERC has such authority or is given such authority by new legislation, it would not be appropriate for FERC to turn around and delegate the exercise of its authority to a self-regulating reliability organization such as NERC. Unlike a federal agency, a private group is not bound by the statutory and constitutional requirements that provide due process to persons who might be adversely affected by the group's actions. There is no requirement for public notice or the opportunity to comment before a private group takes action. No protection against *ex parte* communication with the rule-making entity is afforded. Nor is there a basis for judicial review of the organization's action. That is why agencies which are authorized to adopt standards and criteria issued by private organizations—especially members of an industry group—have secured express statutory authority to do so.³ Congress, not an administrative agency, should address the question of dynamic conformity—whether changes to the private organization's standards *after* they have been adopted by FERC should be binding on industry members who have had no voice in the decisions of the private organization. Moreover, a private organization having delegated authority to prescribe mandatory reliability standards would probably fall under the detailed procedural strictures of the Advisory Committee Act, 5 U.S.C. App. 1 *et seq.* See *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). These are but some of the issues that must be dealt with before a blanket delegation of governmental authority to NERC or some other private organization merits serious consideration.

In the case of FERC, there is no express or implied statutory authority to delegate to a private organization such as NERC the Commission's authority over even fully jurisdictional public utilities, much less the larger class of electric utilities and Federal power agencies that are not subject to FERC's general jurisdiction. If such statutory authority were granted, moreover, it would make little sense for FERC to delegate the authority to a self-regulating reliability organization, even if the statute authorized such a delegation, unless that organization also had the ability to resolve all disputes amicably and without FERC intervention. The prospects of an amicable resolution of all disputes relating to reliability are not bright, considering the record of such disputes in the past. This means that disputes arising before the self-regulating reliability organization would eventually come before FERC for resolution after the reliability organization has had its say. To resolve such disputes, FERC would have to add significant Staff with expertise in the area of planning and operating electric systems. Thus, the attempt to delegate the

³. See, e.g., 15 U.S.C. 2664 (EPA standards for controlling radon levels in new buildings should be developed with the assistance of organizations involved in establishing national building construction standards and techniques.); 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(a) (Secretary of Labor shall by rule promulgate as an occupational safety and health standard any national consensus standard. The term national consensus standard means an occupational safety and health standard which has been adopted and promulgated by a nationally recognized standards-producing organization after certain procedural safeguards have been afforded. See 29 U.S.C. 652(9).)

Commission's authority over reliability issues would not, in the long run, eliminate the burden of resolving those issues. Instead, it will simply add another layer of bureaucracy to the task and increase the time and money that must be expended to obtain a decision.

4. Are there elements in CECA, or other electric reliability legislative language, which can, with or without modification, be used in a rulemaking?

Semantics are not the problem. FERC knows how to draft a rule when it wants to do so. We do not believe, however, that the Comprehensive Electric Competition Act (CECA) or any other legislative proposal can be transmuted into a FERC rule without extensive modifications and improvements. Energy legislation is drafted with the full weight of the Constitution's grant of the Commerce Clause power behind it. An administrative agency, however, is obliged to put forward a proposed rule for public comment and take into account the comments it receives when it issues a final rule. It can not, and does not, write on a clean slate as Congress does. Its authority, in short, is not plenary. The agency must carry out the organic statute; it cannot create the statute. This means that any rulemaking proposal that the Department brings to FERC must await the enactment of legislation expressly authorizing FERC to issue a rule on the subject of the Department's proposal. When FERC acts, it can do so only in pursuance of the statutory authority it has been given. Any proposal for rulemaking the Department issues cannot be drafted in the abstract but must be trimmed to fit FERC's statutory authority. In turn, this means that the Department should be providing its support for reliability legislation put forth by electric industry groups rather than engaging in a fruitless effort to imagine what the content of such rules might be.

5. What should the relationship be between Regional Transmission Organizations, as advanced in FERC Order No. 2000 . . . and an Electric Reliability Organization as proposed in CECA?

Assuming that an Electric Reliability Organization will be created by statute, it will be necessary to rethink the relationship between such an organization and the RTOs. As matters now stand, the RTOs are given considerable authority over regional reliability issues under Order No. 2000. Order No. 2000 states that one of the characteristics of an approved RTO is that it must have exclusive authority for maintaining the short-term reliability of the transmission grid under its control. FERC Stats. & Regs. 31,089 at 31,092. Currently, there appears to be a great deal of overlap between the reliability functions ascribed to RTOs under Order No. 2000 and the functions carried on by NERC. FERC Order No. 2000 does not appear to recognize that there is a place for an Electric Reliability Organization. On the other hand, various stand-alone legislative proposals have been circulated. They have called for the creation of an Electric Reliability Organization and subservient Regional Reliability Organizations (RROs). This organizational structure would be analogous to the current system in which NERC rules are administered by ten Regional Reliability Councils. So there is a great deal of work that must be done if there is to be a national Electric Reliability Organization that is subject to FERC's jurisdiction, together with RROs that exist side-by-side with the various RTOs that FERC envisioned in Order No. 2000.

Another important issue that has been acknowledged, but has not been addressed, is the potential for differences between the geographic scope of an RTO and the geographic responsibility of the corresponding RRO. So far as practicable, the two entities should serve the same territory, and a single RTO should not be located in two or more reliability regions. Confusion and inevitable conflict would be the result of overlapping regional boundaries. A single RTO might be

burdened with an obligation to comply with the (possibly conflicting) standards of two or more Regional Reliability Organizations. This is not a purely theoretical concern; reliability criteria can vary from one region to another, and with good reason. What the rulemakers must do is avoid the confusion that will spring from a situation in which the Regional Reliability Organization includes only part of an RTO or an RTO finds itself attempting to operate within the geographic boundaries of two different Regional reliability Organizations.

Unless there is a clear delineation of duties between and RTO and an RRO and geographic boundaries that circumscribe an RTO within a single RRO, there will be an intractable regulatory morass. Entities participating the wholesale electric market will never be certain whether to take an issue to the RTO or the RRO. Since both RTOs and RROs will be subject to FERC's jurisdiction, aggrieved parties will likely run directly to FERC for resolution of their concerns.

6. How should the responsibilities and roles of FERC and the States be addressed in the rulemaking?

The existing legal relationships and authorities of FERC and the States and their governmental subdivisions under the Federal Power Act should be preserved and respected.

There is no reason why the implementation of national reliability standards should in any way impact adversely on the authority of the states as regulators of retail electric service or of public power agencies created and operating under state law. An organization such as NPPD which is located on the western edge of the Eastern Interconnection of the U.S. electrical grid understands very well the importance of compliance with the highest standards of electrical reliability. We also understand, and concur in, the notion that neighboring utilities must comply with compatible, if not identical, reliability criteria. The fact that some of these utilities may be public power agencies, while others are investor-owned, while still others are cooperatives makes no difference with regard to reliability. Everyone in a region must obey the same rules.

At the same time, the Department and the FERC must understand that public power agencies have an important and legitimate function to perform. In enacting the Federal Power Act, Congress expressly chose to permit and, indeed, encourage diversity of ownership and control of electric utilities in accordance with the wishes of the people who are served. There is no sound basis for attempting to impose unnecessary uniformity on all electric utilities under the guise of implementing reliability standards. Public power agencies, such as NPPD must be allowed to comply with the laws of the states in which they are located. They must not be required by federal fiat to comply with rules that would threaten their status as issuers of tax-exempt bonds. As long as those minimal criteria are met, public power will be a full-fledged partner in the creation and implementation of sound reliability rules.

7. Recognizing the international nature of the interconnected transmission grid, how could implementation of mandatory reliability standards be coordinated with Canada and Mexico?

Implementation of mandatory reliability standards without agreement by Canadian entities to be bound by the same standards will prove unworkable. The North American electric system has developed with numerous interconnections with the Canadian provinces. This has led to interdependence among the utilities on both sides of the border for the reliability of the electric system. Implementation of mandatory reliability standards without agreement by Canadian entities to be bound by the standards will not only be unworkable but will also prove contentious and disruptive. The requisite coordination can be accomplished through agreements executed by

appropriate representatives of the Canadian entities and the U.S. entities.

III. Conclusion

The adoption and implementation of mandatory national (and international) electric reliability standards is too important a subject for a feckless attempt to rush out a rulemaking action at this juncture. Instead, the Department should first seek legislative authority for FERC to issue and administer such standards, authority it does not now possess. Only after such statutory authority exists will it be appropriate to propose the issuance of specific regulations to carry out the new statute. Any rulemaking action in this area should recognize that the states have a legitimate role to play in the regulation of electric utilities serving at retail and in the ownership of public power agencies. That role must, and should, be respected. The respective reliability functions of the RTOs and any Regional Reliability Organizations that arise must be rationalized, so that RTOs are not in a position of having to obey conflicting instructions from two sources. Finally, Canadian utilities should be brought into the effort to develop and implement new reliability rules, in recognition of the fact that we are served by an electrical grid that is international in scope.

Respectfully submitted,

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