

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

Rules Concerning Certification of the)	
Electric Reliability Organization; and)	Docket No. RM05-30-000
Procedures for Establishment, Approval)	
And Enforcement of Electric Reliability)	
Standards)	

**REQUEST FOR REHEARNG AND/OR CLARIFICATION
OF THE
EDISON ELECTRIC INSTITUTE**

The Edison Electric Institute (EEI) submits this request for rehearing and/or clarification of Order No. 672.¹ EEI is the association of the nation's shareholder-owned electric utilities and affiliates and associates world-wide. EEI's members are owners, operators and users of the bulk power system and are subject to the reliability standards established by the Electric Reliability Organization (ERO). EEI has supported over the course of several Congresses the legislation establishing the ERO that was enacted as part of the Energy Policy Act of 2005 (EPAAct). EEI and its members look forward to the establishment of the ERO and its important work in assuring the reliability of the nation's bulk power system. The issuance of Order No. 672 was a major step forward in accomplishing this objective and sets the framework for the establishment of the ERO and the ERO application process. The Order appropriately creates a strong ERO subject to Commission review. EEI thanks the Commission for respecting the comments received.

¹ 114 FERC ¶61,104 (February 3, 2006).

EEI has identified four issues on which it seeks rehearing and/or clarification, the result of which, EEI believes, will further strengthen the institution of the ERO and the process to establish and enforce mandatory reliability standards, and is intended to assist the Commission in further improving the order and buttressing it against possible future legal attack.

1. The Order should be revised to provide that the single appeal the Commission determines is appropriate should occur at the ERO level, not at the Regional Entity level. (P 611).
2. The Commission should clarify that the notice and comments requirements of Section 553 of the Administrative Procedures Act apply to the Commission's review of proposed Reliability Standards. (P 308).
3. The Commission should clarify that deadlines imposed on the ERO's consideration of proposed Reliability Standards on remand will respect the requirements in Federal Power Act Section 215 that the ERO have an open process and that the Commission will give due weight to the technical expertise of the ERO. (PP 408-12)
4. The Commission should clarify that the statutory obligation to comply with applicable reliability standards applies regardless of the size of the entity that is an owner, operator or user of the bulk power system. (P 866).

1. There Should Be a Single Appeal at the ERO Level.

The Order provides that an appeals process at the ERO or Regional Entity level is appropriate and that "the ERO applicant must propose in its application for certification for approval by the Commission whether the appeal of a penalty imposed by a Regional

Entity should be at the ERO or Regional Entity level.” (Order at P 611). EEI appreciates the Commission’s determination that there should be a single appeal, not multiple levels of appeal. However, EEI asks the Commission to reconsider its decision that this single appeal could be either at the ERO or Regional Entity level and instead provide that the single appeal should be only to the ERO.

In our comments on the ERO NOPR, EEI urged that appeals from an enforcement action taken by a Regional Entity should be to the ERO, and ultimately to the Commission. EEI stated that there should not be an additional level of formal appeal at the Regional Entity level to “ensure that the process is completed in a manner that is both timely and focuses resources on improving reliability rather than multiple layers of procedures.” (EEI Comments at p. 18). EEI believes that having the single formal appeal be only to the ERO will further strengthen the ERO and the enforcement and compliance process by providing needed consistency in interpretation of reliability standards and in the sanctions applied across Regional Entities.

EEI therefore requests that the Commission provide that there shall be a single appeal to the ERO that will occur after the Regional Entity has rendered its final decision in accordance with the Regional Entity’s compliance enforcement procedures. The Commission should also clarify that each Regional Entity must have a process to resolve issues that arise in the course of implementation of its compliance enforcement program before a final decision in a particular matter is reached by the Regional Entity. The Commission and the ERO should ensure that the Regional Entity compliance enforcement process includes due process protections and procedures to resolve such

issues. Once the Regional Entity has rendered its final decision, the entity that is the subject of the compliance enforcement decision may pursue an appeal to the ERO.

ERO consideration of all appeals will also enable the ERO to carry out the Commission's directive that it expects the ERO to set up a uniform process for implementing its enforcement authority to be carried out by a Regional Entity. (Order at P 486). Having all appeals conducted by the ERO provides another means of assuring not only that there are uniform processes but that they are implemented in a consistent manner. EEI believes that following this approach will result in more matters being resolved at the Regional Entity level and fewer formal appeals being taken to the ERO.

2. The Commission Should Clarify that the Notice and Comment Requirements of Section 553 of the Administrative Procedure Act Will Apply to the Commission's Review of Reliability Standards

In order to make Order No. 672 more defensible against possible future legal challenge, EEI recommends that the Commission clarify that the notice and comment requirements of Section 553 of the Administrative Procedure Act ("APA") will apply when it reviews a Reliability Standard proposed by the ERO. In particular, while the regulatory text attached to the Order No. 672 appropriately provides that the Commission will provide for "public notice and opportunity for hearing" when the Commission reviews proposed reliability standards, the discussion contained in the Order's preamble creates some confusion regarding whether the Commission is actually required to allow such public participation and in what circumstances will such notice and comment not be provided. Specifically, the Order notes that:

[S]ection 215(c)(2)(D) of the FPA requires the ERO to allow for reasonable notice and opportunity for public comment in developing a Reliability Standard. In contrast, section 215 does not specifically require that the

Commission provide notice and opportunity for public comment when reviewing a Reliability Standard proposed by the ERO.

Order No. 672, P 308. Nevertheless, the Order states, “[w]e will, however, provide notice and opportunity for public comment except in extraordinary circumstance.” Id. The Order does not elaborate regarding what it meant by “extraordinary circumstances.”

EEI is concerned that this discussion could open the Commission to legal challenge if it should not allow for notice and comment in reviewing a particular ERO standard. This concern is based upon legal precedent which establishes that even though Section 215 does not state that the Commission will provide for notice and comment in reviewing an ERO standard, notice and comment is, nevertheless, required by the Due Process Clause and Section 553 of the Administrative Procedures Act. See e.g., Mobile Exploration and Producing North America, Inc. v. F.E.R.C., 881 F.2d 193, 199 (5th Cir. 1989) (explaining the due process and Administrative Procedures Act notice and comment requirements for agency decision making).² Importantly, while not using the terms “extraordinary circumstances, Section 553(b)(B) of the APA does provide an exception to this notice and comment requirement

when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

² Should the Commission establish new, binding rules in an “individual adjudication”, as opposed by a rulemaking proceeding, due process still applies, requiring “that affected parties be allowed to challenge the basis of the rule. Due process further requires that FERC provide notice which is reasonably calculated to inform all those whose legally protected interests may be affected by the new principle.” Id.

5 U.S.C. § 553(b)(B); see State of N.J. Dept. of Environmental Protection v. E.P.A., 626 F.2d 1038, 1045 (D.C. Cir. 1980) (explaining that “the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and reluctantly countenanced.”).

Given the foregoing precedent, the Commission will buttress its ability to defend its actions in reviewing ERO proposed standards by clarifying that the notice and comment requirements of Section 553 will apply to such review. Furthermore, EEI recommends that the Commission clarify that the “extraordinary circumstances” exception discussed in the preamble will be construed to have the same meaning as the exception to notice and comment provided in Section 553(b)(B).

3. The Commission Should Clarify that any Deadline Established on Remand Will Respect Section 215’s Requirement that the ERO Have Open Processes and that the Commission Will Defer to the ERO’s Expertise.

In the Order, the Commission adopted the NOPR’s proposal that any remand to the ERO of a reliability standard may contain a deadline by which the ERO must resubmit the proposed standard. Order No. 672 at P 408. Importantly, in setting any such deadline, the Commission held, “we will consider the time needed for a proposed revision to go through the ERO’s processes as well as any need to have an enforceable Reliability Standard in a timely manner.” Order No. 672 at P 410. EEI strongly supports the Commission’s recognition of the need to respect the ERO’s open processes and takes this opportunity to emphasize that importance of the ERO’s open processes, as well as Section 215’s requirement that due weight be provided to the ERO’s technical expertise. A fundamental tenant of Section 215 is that the mandatory standards will be developed

utilizing industry expertise through the ERO's open processes, as codified in Section 215(c)(2)(D)'s notice and comment, due process and openness requirements "in [the ERO's] developing reliability standards and otherwise exercising its duties." In addition, Section 215(d)(2) requires that the Commission give "due weight" to the technical expertise of the ERO on non-competition matters. EEI respectfully requests that the Commission clarify that in setting any such remand deadline (particularly those for remands involving substantive changes to a reliability standard), that the Commission will give appropriate recognition to these Section 215 requirements.

4. The Commission Should Clarify that the Small Entities Are Not Exempted from the Statutory Obligation to Comply with Applicable Reliability Standards.

In the context of commenting on the Commission's Regulatory Flexibility Act (RFA) certification in the NOPR, NRECA contended that the Small Business Regulatory Enforcement Fairness Act (SBREFA) provides an additional statutory reason to the RFA to have the Commission exempt small electric utilities, particularly distribution cooperatives from coverage under the Reliability Standards. (Order at P 862). The Order also notes APPA's comment that a majority of the nearly 2000 government-owned utility systems in the United States are distribution-only utilities that have "little or no interaction with the Bulk-Power System," and that approximately 1,970 such entities meet the standard for a "small utility" under the RFA analysis. The Order further notes that APPA "assumes that the new ERO, the Regional Entities and the Commission will focus their reliability efforts on those entities whose activities substantially impact the Bulk-Power System, and that distribution-only entities will not be targeted." Order at P 864.

EEI appreciates the Commission's acceptance of EEI's request to explicitly state in the regulations that all users, owners and operators must comply with the regulations under Part 39. (Order at P 112). In responding to NRECA's and APPA's comments, the Order provides that "[u]ntil the Commission has approved a specific Reliability Standard that impact a particular type/class of users, it is premature to consider NRECA's and APPA's concerns and RFA implications, if any, of the Commission's implementation of section 215 of the FPA." (Order at 866). As the Commission notes, some Reliability Standards, by their terms, may not be applicable to small entities or to distribution-only entities. However, there should be no categorical exemption from the statutory obligation on owners, users and operators of the Bulk-Power system to comply with applicable Reliability Standards. Therefore, EEI asks the Commission to clarify that small-entities are not exempted from the statutory obligation under Section 215 to comply with applicable Reliability Standards.

Respectfully submitted,

/s/

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