

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

Nebraska Public Power District

) **Docket No. RR11-**

**PETITION OF THE NEBRASKA PUBLIC POWER DISTRICT
FOR REVIEW OF NERC BOT'S DENIAL OF TRANSFER REQUEST**

Pursuant to Sections 215 and 309 of the Federal Power Act, 16 U.S.C. §§ 824o and 825h, Sections 39.8(d) and Rule 207(a)(5) of the Rules of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. §§ 39.8(d) and 385.207(a)(5)(2010), Nebraska Public Power District (“NPPD”) petitions for FERC review of a February 17, 2011 split decision by the Board of Trustees (“BOT”) of the North American Electric Reliability Corporation (“NERC”) denying NPPD’s (and other Nebraska entities’) request to transfer their compliance registration from the Midwest Reliability Organization (“MRO”) to the Southwest Power Pool Regional Entity (“SPP RE”). NPPD was formally notified of this decision via a March 3, 2011 letter from NERC (copy attached hereto) that indicated the request to transfer “subject to certain conditions as contained in the draft decision previously circulated to the Board of Trustees, failed on a vote of five affirmative votes and six negative votes,” with one trustee recusal.

No written decision supporting the denial issued nor did any individual trustee offer a written explanation for his/her negative vote. The lack of explanation by itself suggests strongly the denial is arbitrary and capricious. Given the lack of any explanation, this petition should be reviewed under a *de novo* standard that allows the Commission to evaluate independently the applicable law and facts in assessing whether the transfer request furthers the statutory goal of promoting the effective and efficient administration of the bulk power system. NPPD submits

that (1) reversal of the BOT's split decision is required because denial does not promote the statutory goal and is otherwise arbitrary and capricious, and (2) the Commission should modify MRO's and SPP RE's delegation agreements to allow NPPD to transfer its compliance registration from MRO to SPP RE.

A. COMMUNICATIONS

NPPD requests that all communications related to this proceeding be addressed to the following persons:

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B. INTRODUCTION

NPPD, a public corporation and political subdivision of the State of Nebraska governed by a publicly elected 11-person Board, is not a "public utility" as defined by the FPA. NPPD engages in the generation, transmission and delivery of electric power and energy, subject to Nebraska statutes, with over 4,200 miles of transmission facilities and related substations that serve approximately 89,000 retail customers along with the wholesale requirements of 78 municipalities, public power districts, and cooperatives located throughout Nebraska. In total, NPPD directly or indirectly provides energy and transmission service to approximately 800,000 Nebraskans.

In 2008, the Commission approved NPPD's voluntary decision to join the Southwest Power Pool ("SPP"), which meant NPPD transferred operational control of its transmission facilities to SPP. *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,239 (2008). From a geographic perspective, the addition of NPPD and the other Nebraska entities to the SPP RTO means that virtually the entire State of Nebraska is encompassed within SPP's boundaries. Also at that time, NPPD submitted a notice, pursuant to the MRO bylaws, of withdrawal as a member of MRO. Besides filing a notice of withdrawal with MRO, NPPD along with SPP RE requested a transfer of NPPD's compliance registration from the MRO to the SPP RE. More than two years later, MRO has taken no action on NPPD's notice of withdrawal, while opposing NPPD's transfer request. On June 29, 2010, NERC 2010 asked for reports from the MRO and SPP RE evaluating the request. It appears, from NERC's March 3 notification, that NERC staff supported the transfer subject to conditions, but the request was denied by the split decision of NERC's BOT without any written explanation.

C. ARGUMENT

1. A *De Novo* Standard of Review Should Apply

NPPD's petition for review should be reviewed *de novo* by the Commission for at least three reasons. First, the appeal raises a legal question of whether the BOT's split decision to deny the transfer request is consistent with the statutory standard, a matter that the Commission, not the BOT, is charged with deciding. Second, this legal issue raises a case of first impression about how the law should be applied in a transfer situation for which a *de novo* ruling by the Commission would provide clarity and certainty. Third, no written explanation of how the statutory plan is furthered by denial accompanies the BOT majority vote. Consequently, the Commission and the parties must speculate about possible rationale(s) behind the majority's

vote, which is a sign that the BOT vote constitutes arbitrary and capricious decisionmaking. Rather than engage in speculation, the Commission should consider the matter anew in light of the legal and factual considerations that it finds controlling.

2. Granting the Transfer Request Would Further the Statutory Goal

The Commission determined that the “ERO should evaluate the Regional Entity applicant according to the statutory and regulatory criteria.” Order No. 672, *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, FERC Stats. & Regs. ¶ 31,204 at P 670 (2006). A transfer request involves an amendment to a regional entity’s delegation agreement, *id.* at P 671. In evaluating the scope of the instant amended delegation agreements, the key statutory and regulatory criterion is whether allowing a transfer request “promotes effective and efficient administration of the bulk-power system.” FPA § 215(e)(4)(C); *see* 18 C.F.R. § 39.8(c)(3) (same).¹ These evaluations are made “in the context of the particular facts and circumstances” of the specific request. Order No. 672 at P 671.

The particular facts and circumstances of NPPD’s request show the transfer request is integral to NPPD’s decision to join SPP. The advantage of having a regional transmission organization (“RTO”) coterminous with a regional entity were acknowledged from the outset of forming regional entities. “The Commission recognizes the potential benefits of having the same boundaries for an RTO/ISO and a Regional Entity.” Order No. 672 at P 697. The SPP, as initially constituted, included all the Balancing Authorities and Transmission Owners that had committed to place their transmission facilities under the SPP Open Access Transmission Tariff. These factors show that transferring the compliance registration of any new member of SPP RTO

¹ FPA § 215(e)(4) also requires that a regional entity meet other criteria (*e.g.*, independent or balanced board). NPPD’s transfer request does not implicate those other criteria, however, leaving the “effective and efficient administration” criterion as the key decisional factor.

requesting such transfer to SPP RE would be reasonable in light of the existing configuration as well as the benefits of adding new members. Indeed, the Commission essentially confirmed that assessment when it found that SPP’s increased size and energy market participation after NPPD joined “enhance the *reliability* and economic benefits of SPP.” *SPP*, 125 FERC ¶61,239 at P 15 (emphasis added). Allowing NPPD’s transfer to SPP RE after it joined SPP couples the benefits of the RTO/RE’s coterminous operations with the enhanced reliability of a larger footprint, which, in turn, makes administration of the SPP bulk power system more effective and efficient.

NPPD’s “dual citizenship,” as a member of SPP RTO but a registered entity in MRO, has and will continue to cause a number of reporting and compliance inefficiencies that result in costly redundancies due to the need for NPPD to monitor reliability issues in both MRO and SPP RE in order to assure compliance with two sets of rules. NPPD submits that effective and efficient administration of the bulk power system will be enhanced by aligning NPPD’s and the NE Entities’ operations not only with the SPP RTO, the SPP Reliability Coordinator, the SPP Planning Authority but also with SPP RE.

3. Denying the Transfer Perpetuates Redundancies and Inefficiencies

Despite their efforts to coordinate compliance matters related to NPPD’s situation, MRO and SPP still have a number of overlapping or inconsistent reporting and compliance requirements that place an added burden on them and NPPD. MRO and SPP define inter-regional transactions differently. As a result, the same transactions may be reported differently, depending on which definition is used. For example, MRO and SPP have different testing guidelines for generating units, which creates the possibility that different capability values would be reported for the same units. For wind facilities capability, MRO has a separate process for collecting assessment data, while SPP does not. These variations create the potential for

differing responses to NERC-initiated data requests about the same matters, which increases the possibility of confused reporting or interpretation of submitted data.

MRO and SPP have different requirements in their real capability guidelines related to generator capability testing for test length, when tests are administered, and what/design conditions apply, among other things. Similar areas of differences are also present in MRO's and SPP's reactive capability guidelines regarding test length, method of verification, and exemptions. These differing guidelines for testing generating unit capability cause needless inefficiencies by forcing NPPD either to pay for two sets of tests or to pay to have the same collected test data analyzed in two different ways to satisfy both sets of guidelines.

The situation does not differ for proposed planned resource adequacy assessments. While both MRO and SPP RE require NPPD to commission periodic Loss of Load Expectancy ("LOLE") studies, MRO has proposed an annual study with one list of factors to be considered in conducting the study, while SPP RE's study is bi-annual with a different list of factors. The possibility of differing timetables and consideration factors creates uncertainty and potential added expenses for not only NPPD, but also may affect other members of SPP RTO. Again, NPPD must expend time and effort either for two sets of studies or to extrapolate two analyses from one study to obtain results necessary to satisfy both assessments. But even that aside, LOLE studies examine how NPPD's resources interact with the other SPP RTO members, thus those members may be asked to modify their processes so that NPPD can satisfy its MRO requirements even though such changes might not be required under SPP RE's assessment. Thus, the inefficiencies extend beyond NPPD and the two regional entities to include affected SPP members. Additionally, NERC has just launched a Regional Event Analysis effort under which each RE will report for all entities registered with it. This creates a situation in which NPPD is

subject to SPP protocols and SPP RC directives, but would be participating and responding to an MRO events analysis with data and system responses obtained from SPP.

In denying the request, no member of the BOT majority offered any explanation of, nor is it inherently apparent, how continued compliance activities by NPPD under such overlapping and inconsistent requirements improve bulk power system reliability. Quite the opposite, such requirements both add unnecessary expense and increase the possibility of confusion, neither of which is indicative of efficient, effective administration of the bulk power system. This result erodes the enhanced reliability and other benefits for the entire SPP bulk power system that the Commission found resulted from SPP's larger footprint after NPPD joined. *SPP*, 125 FERC ¶ 61,239 at P 15. Such erosion in the FERC-anticipated benefits shows denying the transfer request reduced, rather than improved, the effective and efficient administration of the SPP's bulk power system. None of these inefficiencies would continue if NPPD's request to transfer to SPP RE were allowed. Accordingly, the Commission should reverse the BOT's decision.

4. No Other Ground Offers A Valid Reason To Deny The Request

Although no written opinion explains the grounds for the BOT majority's vote, MRO's comments opposed the transfer request as forum shopping to evade more stringent compliance enforcement. No evidence points to this as a reason for NPPD's request. Initially, it is worth noting that due to more uniform reliability requirements and clearer FERC guidance about reliability enforcement policy, the supposed advantages of RE forum shopping, if ever there were any, have largely been eliminated. In any event, NPPD's transfer represents a move from MRO with a lower enforcement rate (0.79 violations per registered entity) to SPP RE with nearly triple the violation rate (2.22 violations per registered entity). Factually, nothing supports a claim that NPPD wants to transfer simply to avoid more stringent compliance enforcement.

Again, although the BOT majority vote is unaccompanied by any rationale, MRO's comments opposing the transfer argued that registered entities have no right to dictate in what regional entity they will register. The MRO's suggestion that NPPD's voluntary decision to join SPP RTO was done as a means to assure registration with SPP RE attempts to place the wagon before the horse. NPPD's decision to join SPP RTO was not driven by a desire to change its RE, but by a desire to obtain the benefits of belonging to an RTO. Having made the decision to join the SPP RTO, the logical next step was to seek registration within the SPP RE to maximize reliability benefits and reduced inefficiencies. The validity of taking that logical next step is affirmed by SPP RE's continued strong support for the transfer at every stage in the process.² SPP RE's support rests on its view that the transfer is consistent with the setting of the original regional entity boundaries, will not be detrimental to reliability, and will provide for more efficient and effective administration of the bulk power system. Given that SPP RE will bear the burden of assimilating NPPD, considerable weight should be given to its support as a reason to allow the transfer.

From a policy standpoint, denying the request contravenes efforts to encourage public power entities to join RTOs. *E.g., TRANSLink Transmission Co. LLC*, 101 FERC 20 61,140 at P 26 (2002). Without public power involvement, RTOs can have significant "holes" that limit their ability to maximize potential benefits of operating a system-wide grid. NPPD's decision to join SPP substantially increased the scope of SPP with corresponding reliability and other benefits that would not otherwise be realized. NPPD's choice was premised, however, on the reasonable expectation that NPPD would become, as other SPP members are, an SPP RE registered entity and thus achieve the full efficiencies (discussed above) associated with this transfer. The BOT's denial of NPPD's transfer request notwithstanding SPP's and SPP RE's support will chill interest

² It is NPPD's understanding that SPP RE will file an appeal from the NERC BOT's denial of the request.

by other public power entities in RTO participation, particularly in situations where their choice of what RTO to join might require them to switch regional entities for improved efficiencies in bulk power system administration. Many will be unwilling to expend the time and effort needed over an extended period of uncertainty while their transfer requests are considered when, even with support of the transferee RE, their request can be denied without explanation. As a result, the “holes” in RTO coverage will remain in place contrary to FERC policy for maximizing the benefits of an RTO operating structure.

C. CONCLUSION

For the reasons discussed, NPPD petitions the Commission: (1) to reverse the split decision of the BOT to deny NPPD’s transfer request and (2) to amend MRO’s and SPP RE’s delegation agreements to permit the transfer of NPPD’s compliance registration from MRO to SPP RE.

Respectfully submitted,

/s/ Dennis Lane

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Dated: March 18, 2011

CERTIFICATE OF SERVICE

I hereby certify on this 18th day of March, 2011, I have this day served a copy of the foregoing document, via electronic mail or first class mail, upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding and to:

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Re: Request of Nebraska Entities to Transfer Registration from MRO to SPP RE

Dear Ms. Dochoda and Mr. Skaar:

This letter is formal notice that at the February 17, 2011 meeting of the NERC Board of Trustees, the motion by Ken Peterson to approve the request from the Nebraska Entities (Nebraska Public Power District, Omaha Public Power District, City of Hastings, and City of Grand Island) to transfer their compliance registration from the Midwest Reliability Organization to the Southwest Power Pool Regional Entity, subject to certain conditions as contained in the draft decision previously circulated to the Board of Trustees, failed on a vote of five affirmative votes and six negative votes. Trustee Roy Thilly recused himself from participation in the matter. Accordingly, the request to transfer was not approved.

Sincerely,



David N. Cook
Corporate Secretary

cc: All parties

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Document Content(s)

Petition for Review of NERC BOT.PDF.....1-12