

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

U.S. Department of Energy,
Portsmouth/Paducah Project Office

Docket No. RC08-5-____

**REQUEST FOR REHEARING AND CLARIFICATION OF THE NORTH AMERICAN
ELECTRIC RELIABILITY CORPORATION**

Pursuant to section 313(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251(a), and Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713, the North American Electric Reliability Corporation (“NERC”) hereby requests rehearing and clarification of the April 19, 2012 order issued by the Commission in this proceeding (the “April 19 Order”).¹

I. BACKGROUND

The April 19 Order granted an appeal filed by the United States Department of Energy, Portsmouth/Paducah Project Office (“DOE PPPO”) and found that it should not be registered as a load-serving entity (“LSE”) under the NERC Statement of Compliance Registry Criteria (“Registry Criteria”).² Among other things, the April 19 Order found that “NERC has not supported its assertion that the lessees and contractors on the site are separate end-use customers served by [DOE PPPO].”³ The April 19 Order also found that another entity, the Ohio Valley Electric Corporation (“OVEC”), which sells energy to DOE PPPO pursuant to a retail sales tariff, is the appropriate entity to register as the LSE.⁴

¹ *U.S. Department of Energy, Portsmouth/Paducah Project Office*, 139 FERC ¶ 61,054 (2012).

² The Registry Criteria is Appendix 5B to the NERC Rules of Procedure.

³ April 19 Order at P 1.

⁴ *Id.*

In reaching such determinations, the April 19 Order reiterated certain statements from a July 2008 order⁵ in this proceeding that, while declining to make a determination on the merits of DOE PPPO's LSE registration, stated that the actions of DOE PPPO could be viewed as consistent with those of a large industrial customer seeking to purchase transmission service and power from a service provider.⁶ The April 19 Order also stated that the definition of LSE seems to exclude situations where an entity serves its own load.⁷ The April 19 Order ultimately found that because DOE PPPO does not resell the power to the users at its site, it is not properly registered as an LSE.⁸

II. REQUEST FOR REHEARING

The April 19 Order should be reversed because it is not consistent with the Registry Criteria and prior Commission decisions. Specifically, the Registry Criteria provides that an LSE is an entity that “[s]ecures energy and Transmission Service (and related Interconnected Operations Services) to serve the electrical demand and energy requirements of its end-use customers.”⁹ Section III(a) of the Registry Criteria provides that an entity identified as an LSE pursuant to this definition should be excluded from the Compliance Registry if it does not meet additional criteria, including as follows:

- The LSE's peak load is greater than 25 MW and is directly connected to the bulk power system (“BPS”) (section III.a.1);
- *Distribution Providers registered under the criteria in section III.b.1 or III.b.2 will be registered as an LSE for all load directly connected to their distribution facilities, unless responsibility for compliance with the relevant standards has been transferred by written agreement to another entity that has registered for the appropriate function* (section III.a.4).

⁵ *North American Electric Reliability Corporation*, 124 FERC ¶ 61,072 (2008) (“July 2008 Order”).

⁶ April 19 Order at P 7 citing the July 2008 Order at PP 51-52.

⁷ *Id.*

⁸ April 19 Order at PP 23-32.

⁹ See section II of the Registry Criteria.

There is no dispute that the DOE PPPO load is greater than 25 MW and is directly connected to the 345 kV network.¹⁰ In addition, DOE PPPO is a registered distribution provider (“DP”) and its DP registration was upheld by the Commission.¹¹ The record does not indicate, and DOE PPPO has not alleged, that DOE PPPO transferred any responsibilities for compliance with any Reliability Standards by written agreement as contemplated in the Compliance Registry. Therefore, DOE PPPO meets the relevant criteria for registration as an LSE.

In considering the relevant provisions of the Registry Criteria, the April 19 Order inexplicably fails to reference section III.a.4, above. However, as noted in Commissioner Norris’ dissent of the April 19 Order, “[t]he ownership and control of distribution facilities would seem relevant to a determination of load-serving entity status (...).” The Commission has previously found appropriate that a distribution provider be registered as the LSE for all load directly connected to its distribution facilities.¹² As the DP associated with the relevant load, DOE PPPO should be registered also as the LSE.

Moreover, according to DOE PPPO, it is clear that a portion of the power purchased from OVEC is subsequently resold to a third party who compensates DOE PPPO for the power:

A small portion of the electricity delivered to the site pursuant to the OVEC power agreement is used by USEC Inc.[2] in support of its commercial uranium enrichment venture known as the American Centrifuge Project or ACP. The electricity is made available to ACP under the DOE-USEC lease, specifically Exhibit F of the lease, titled Memorandum of Agreement between United States Department of Energy and United States Enrichment Corporation for the Supply of Services, Modification No. 1 (hereafter “Services Agreement”) (Attachment 3). DOE is paid by USEC under the Services Agreement for the electricity used by USEC Inc. to support its operation of the ACP. Payment to DOE for electricity is based on the actual monthly usage by ACP (pro-rata share of site usage).

¹⁰ DOE PPPO May 13, 2008 Appeal at 2-3 (“DOE PPPO Appeal”).

¹¹ July 2008 Order at P 39.

¹² *Direct Energy Services, LLC*, 125 FERC ¶ 61,057 (2008) at P 24 (approving revisions to the Compliance Registry to “have registered distribution providers also register as the LSE for all load directly connected to their distribution facilities”).

[2] USEC Inc., which operates the ACP, is a separate corporation from USEC. USEC leases the enrichment facilities, including the ACP facilities, from DOE. USEC subleases the ACP facilities to USEC Inc.¹³

The above quote, from DOE PPPO's responses to NERC's request for additional information, directly contradicts the finding in the April 19 Order that DOE PPPO's procurement of electric service is not an "independent endeavor to provide or resell that service to the entities located on the DOE Portsmouth site." The fact that the compensation is made on a *pro rata* basis and the fact that the arrangement to supply USEC has its origins on prior activities on the site, which are also referenced by the Commission in support of its finding, are simply irrelevant in light of the clear language of the Registry Criteria and the DOE PPPO responses noted above.¹⁴

Importantly, OVEC, which the Commission believes should be the LSE for the DOE PPPO load, provides power to DOE PPPO via month-to-month contracts under which OVEC purchases a block of power in the wholesale market sufficient to meet DOE PPPO's peak demand with required reserves.¹⁵ DOE PPPO is the entity responsible for the determination of its load profile, pricing and transmission service.¹⁶ Given that DOE PPPO has the ability to purchase from other wholesale and retail suppliers in the region at short notice, OVEC's role is arguably more similar to that of a power marketer than that of an LSE.¹⁷

¹³ DOE PPPO's September 5, 2008 Response to NERC's request for information, submitted as Attachment C to NERC's October 6, 2008 Compliance Filing.

¹⁴ April 19, 2012 order at P 28.

¹⁵ DOE PPPO Appeal at 3. See also DOE PPPO's September 5, 2008 Response to NERC's request for information, submitted as Attachment C to NERC's October 6, 2008 Compliance Filing.

¹⁶ June 12, 2008 Motion to Intervene and Comments of ReliabilityFirst Corporation at 8 and Attachment A (ReliabilityFirst Assessment of DOE Registration Appeal).

¹⁷ DOE PPPO has disputed that it has the ability to purchase power from other suppliers because the Public Utilities Commission of Ohio informed it that it would not "support any entity other than OVEC supplying power to the Portsmouth site." While this statement is not entirely clear, it does not contradict the terms of DOE PPPO's short-term power purchase agreement with OVEC. See June 27, 2008 Motion of the Department of Energy, Portsmouth/Paducah Project Office for Leave to Answer and Answer to the Comments of Ohio Valley Electric Corporation, North American Electric Corporation, and ReliabilityFirst Corporation at 5.

III. REQUEST FOR CLARIFICATION

Independent from its request for rehearing, NERC seeks clarification that the instant decision is bound by the unique facts of the case and is not intended to apply generally to other entities that secure energy and transmission service on their own behalf and that own or operate distribution facilities. This is consistent with prior decisions on registration appeals where the Commission emphasized that the orders were the result of a fact-specific analysis and “ruled solely on the appeal before [the Commission] based solely on the facts before [the Commission].” *See Cedar Creek Wind Energy, LLC et al.*, 137 FERC ¶ 61,141 (2011) at P 22; *see also New Harquahala Generating Company, LLC*, 123 FERC ¶ 61,173 *order on clarification*, 123 FERC ¶ 61,311 (2008).

Specifically, NERC requests that the Commission clarify that it did not intend to preclude registration as an LSE of entities that secure energy and transmission service and also distribute the power that they consume regardless of compensation. Some of these entities may self-generate all or a portion of their needs or purchase energy from power marketers. In those cases, it is possible that *no third party* “secures energy and transmission service” on behalf of that load. Absent clarification that the Registry Criteria does not preclude registration as an LSE of an entity that serves its own load under these circumstances, there could be a gap in registration and thereby a gap in compliance with otherwise applicable Reliability Standards.

In the specific case of DOE PPPO, NERC did not rely on DOE PPPO’s actions of securing energy and transmission service for itself as an end-use customer as the basis for the LSE registration.¹⁸ However, in other cases, depending on specific facts, this could form the basis of an entity’s registration as an LSE. This is particularly relevant if the entity that secures energy and transmission service for itself also owns and operates the distribution facilities that

¹⁸ October 6, 2008 Remand Decision at 5.

are used to distribute such energy, as discussed above, in accordance with section III.a.4 of the Registry Criteria. A broad statement that an entity that is not compensated for securing energy and transmission service is not properly registered as an LSE, which could, in certain cases, be the distribution provider to which the load is connected, would be inconsistent with the Commission's prior order on this issue.

If the Commission disagrees with NERC's request for clarification, NERC, in the alternative, requests rehearing with respect to the referenced findings of the April 19 Order.

IV. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to 18 C.F.R. §385.713(c), NERC seeks rehearing on the following issues and asserts that:

- The Commission erred in applying the Registry Criteria, and in particular section III.a.4 to the facts of this case and finding that DOE PPPO is not properly registered as an LSE.
- The Commission erred in failing to find that DOE PPPO, as the DP, was the LSE given that DOE had not transferred such responsibilities to a third party, such as OVEC.

To the extent that the Commission fails to grant clarification as requested in section III above, NERC also seeks rehearing and asserts that:

- The Commission erred in failing to expressly limit the statements in its decision to the specific facts of this case and indicating that, as a general matter, an entity that is not compensated for securing energy and transmission services is not properly registered as an LSE.

- The Commission erred in failing to explain how the ownership and operation of distribution facilities by DOE affected its determination in light of the Commission's prior precedent indicating that a distribution provider could be registered as the LSE for all load directly connected to its distribution facilities.¹⁹

With respect to all of the above issues, the April 19 Order is arbitrary and capricious. In addition, the Commission has failed to properly support its findings and conclusions and, therefore, failed to engage in reasoned decision-making.

The courts have frequently reiterated that an agency "must 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198, 368 U.S. App. D.C. 97 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). In addition, it must cogently explain why it has exercised its discretion in a given manner, *Motor Vehicle, supra*. The Commission's failure to do so prevents courts from evaluating whether or not the agency engaged in reasoned decision-making, *New York v. FERC*, 535 U.S. 1 (2002). In further support of its request for rehearing, NERC respectfully refers the Commission to the discussion in sections II and III of this filing.

¹⁹ *Direct Energy Services, LLC*, 125 FERC ¶ 61,057 (2008).

V. CONCLUSION

Wherefore, for the foregoing reasons, NERC respectfully requests that Commission grant the requested rehearing and clarification consistent with the discussion above.

Respectfully submitted,

/s/ Rebecca J. Michael

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May 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 21st day of May, 2012.

/s/ Rebecca J. Michael

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