

155 FERC ¶ 61,288
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Western Electricity Coordinating Council	Docket Nos. EL13-52-000 EL13-52-001 EL13-52-003 RR13-12-000 RR13-12-001 RR13-12-002 RR13-12-004
North American Electric Reliability Corporation	Docket Nos. RR13-10-000 RR13-10-001 RR13-10-002 RR14-6-000

(not consolidated)

ORDER GRANTING MOTION TO TERMINATE SUB-DELEGATION
AGREEMENT AND MOTION TO VACATE PRIOR ORDERS

(Issued June 21, 2016)

1. In this order, we grant the joint motion of the Western Electricity Coordinating Council (WECC) and Peak Reliability to terminate the Reliability Coordinator and Interchange Authority Agreement (RC IA Agreement) between WECC and Peak Reliability. In addition, we grant, with minor modifications, Edison Electric Institute's (EEI) motion to vacate all or portions of certain prior Commission orders related to Peak Reliability's funding under section 215 of the Federal Power Act (FPA), as further described herein.¹

¹ 16 U.S.C. § 824o (2012).

I. Background

1. FPA section 215 requires the Commission to certify an Electric Reliability Organization (ERO) to develop and enforce Reliability Standards for the Bulk-Power System. On July 20, 2006, the Commission certified the North American Electric Reliability Corporation (NERC) as the ERO.² The ERO has the authority to delegate certain statutory functions undertaken pursuant to FPA section 215 to a Regional Entity pursuant to FPA section 215(e)(4) and section 39.8 of the Commission's regulations.³
2. On August 23, 2006, NERC filed its proposed 2007 business plan and budget and the proposed 2007 business plans and budgets for eight anticipated Regional Entities, including WECC. The Commission conditionally accepted NERC's proposed business plan and budget and accepted in part the Regional Entity budgets.⁴ With respect to WECC, the Commission initially determined that WECC's reliability coordinator function could not be funded under FPA section 215, because the WECC reliability coordinator would engage in real-time operation of the Bulk-Power System.⁵
3. After holding a technical conference to discuss the issues raised on rehearing of the October 24, 2006 Order, the Commission granted several parties' request for rehearing and allowed WECC to receive FPA section 215 funding for its reliability coordinator functions.⁶ The Commission did not adopt a general policy regarding FPA

² *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

³ 16 U.S.C. § 824o(e)(4); 18 C.F.R. § 39.8 (2015).

⁴ *North American Electric Reliability Corp.*, 117 FERC ¶ 61,091, at P 3 (2006) (October 24, 2006 Order), *order on reh'g*, 118 FERC ¶ 61,111 (2007), *order on reh'g*, 119 FERC ¶ 61,059 (2007) (April 19, 2007 Order). In the October 24, 2006 Order, the Commission reserved judgment on the Regional Entity business plans and budgets because the delegation agreements between NERC and the Regional Entities had yet to be executed or filed with the Commission for approval. October 24, 2006 Order, 117 FERC ¶ 61,091 at P 5.

⁵ October 24, 2006 Order, 117 FERC ¶ 61,091 at P 52 (excluding \$6.9 million from WECC's proposed budget for the reliability coordinator function, and finding that "[u]nless there is a strong separation between oversight and real-time operations, the same entity should not oversee its own compliance with reliability standards").

⁶ April 19, 2007 Order, 119 FERC ¶ 61,059 at P 44.

section 215 funding for reliability coordinators, but instead determined that WECC's reliability coordinator function was a statutory activity based on the circumstances specific to WECC.⁷ The Commission subsequently accepted the NERC-WECC delegation agreement, although the Commission continued to note its concern with the lack of independence between the WECC reliability coordinator and the WECC Regional Entity compliance and enforcement functions.

4. In response to the Commission's directive, WECC entered into agreements, first with NERC, and then with Northeast Power Coordinating Council (NPCC), another Regional Entity, to perform compliance and enforcement activities with respect to WECC's reliability coordinator and interchange authority functions.⁸

A. Bifurcation Order and Peak Reliability Funding Orders

5. In March 2013, WECC filed a petition for declaratory order seeking confirmation from the Commission that, after WECC establishes a separate, independent company to perform the reliability coordinator function in the Western Interconnection, the new reliability coordinator would continue to be eligible for FPA section 215 funding for its reliability coordinator and WECC Interchange Tool functions. WECC also asked for confirmation that after the separation, WECC would be able to exercise compliance and enforcement authority over the new reliability coordinator entity.

6. On June 20, 2013, the Commission granted WECC's petition for declaratory order, finding that the new reliability coordinator entity was eligible for continued FPA section 215 funding, and noting that WECC already received funding for its reliability coordinator activities pursuant to the April 19, 2007 order.⁹ However, the Commission expressly encouraged WECC and interested parties to continue to discuss alternative funding mechanisms.¹⁰ In addition, the Commission conditioned final

⁷ *Id.* PP 21, 24.

⁸ See *North American Electric Reliability Corp.*, Docket Nos. RR06-1-018, *et al.* (Feb. 17, 2009) (delegated letter order); *North American Electric Reliability Corp.*, Docket No. RR11-2-000 (Nov. 15, 2011) (delegated letter order).

⁹ See *Western Electricity Coordinating Council*, 143 FERC ¶ 61,239, at PP 38, 40 (WECC Bifurcation Order), *order on reh'g*, 145 FERC ¶ 61,202 (2013) (December 6, 2013 Order).

¹⁰ WECC Bifurcation Order, 143 FERC ¶ 61,239 at P 42.

approval of WECC's proposed sub-delegation of the reliability and interchange authority functions on Commission approval of the new entity's governance documents.¹¹

7. On August 26, 2013, in Docket No. RR13-10-000, NERC filed an amended delegation agreement between NERC and WECC to implement the separation of WECC's compliance and enforcement functions from its reliability coordinator and interchange authority functions. On September 20, 2013, in Docket No. RR13-12-000, WECC filed documents addressing the formation of Peak Reliability, the newly-created independent reliability coordinator for the Western Interconnection. The filed documents included Peak Reliability's bylaws and the RC IA Agreement between WECC and Peak Reliability.

8. On December 6, 2013, the Commission accepted Peak Reliability's governance documents and the amended NERC-WECC delegation agreement, conditioned on WECC providing confirmation that it intended to sub-delegate the reliability coordinator function to Peak Reliability consistent with the WECC Bifurcation Order.¹² In that order, the Commission also noted that Peak Reliability's bylaws require it to develop an alternative funding proposal for its members' consideration by the end of its second year of operations.¹³ The Commission accordingly directed Peak Reliability to inform the Commission of any changed circumstances with respect to its funding.¹⁴

9. On February 12, 2014, the Commission accepted NERC's and WECC's compliance filings in response to the December 6, 2013 Order, and authorized Peak Reliability to issue billing invoices to fund its 2014 operations.¹⁵ On October 16, 2014, the Commission issued an order accepting the business plans and budgets of NERC and the Regional Entities for the 2015 fiscal year, authorizing the continued FPA section 215 funding of Peak Reliability.¹⁶

¹¹ *Id.* P 39.

¹² December 6, 2013 Order, 145 FERC ¶ 61,202, at P 2.

¹³ *Id.* P 51.

¹⁴ *Id.*

¹⁵ *North American Electric Reliability Corp.*, 146 FERC ¶ 61,092 (2014 Funding Order), *order on reh'g*, 147 FERC ¶ 61,064 (2014) (2014 Rehearing Order).

¹⁶ *North American Electric Reliability Corp.*, 149 FERC ¶ 61,028 (2014) (2015 Funding Order) (jointly with the 2014 Funding Order and the 2014 Rehearing Order, the Peak Reliability Funding Orders).

10. EEI filed timely requests for rehearing of both the WECC Bifurcation Order and the 2014 Funding Order, which the Commission denied, on December 6, 2013 and April 23, 2014, respectively.¹⁷ EEI filed timely petitions for review of each order.¹⁸

B. Peak Reliability Informational Filing

11. In accordance with the December 6, 2013 Order, Peak Reliability submitted an informational filing to the Commission on August 11, 2015 to report on its new funding arrangements. Peak Reliability indicated that, starting on January 1, 2016, funding would be implemented on a contractual basis through the Reliability Coordinator Funding Agreement (RC Funding Agreement). Peak Reliability explained that under the RC Funding Agreement, Peak Reliability “will provide reliability coordinator and other services to balancing authorities and transmission operators in the Western Interconnection and will be compensated by those same entities for providing those services.”¹⁹

C. EEI Motion and Responsive Pleadings

12. On September 1, 2015, EEI filed a motion to vacate the WECC Bifurcation Orders and the Peak Reliability Funding Orders discussed above, arguing that with the voluntary funding agreement among the utilities in the Western Interconnection, the orders are no longer necessary. EEI asserts that the extraordinary or exceptional circumstances required for vacatur are present here, because the Commission has acknowledged that FPA section 215 funding for Peak Reliability was an exception to the rule that reliability coordinator activities should not receive FPA section 215 funding, because the orders for which vacatur is sought are no longer necessary, and because the pending appeals of the orders can be resolved “only by vacating these orders.”²⁰

13. EEI asks the Commission to vacate the WECC Bifurcation Order, the December 6, 2013 Order, the 2014 Funding Order, and the 2014 Rehearing Order in their entirety. In addition, EEI seeks vacatur of the 2015 Funding Order, but only to the extent that it

¹⁷ See *supra* note 13 and note 16.

¹⁸ D.C. Circuit Cases 14-1012 and 14-1071 (subsequently consolidated and currently being held in abeyance after voluntary remand to the Commission).

¹⁹ Informational Filing of Peak Reliability at 2, Docket Nos. EL13-52-001 and RR13-12-000 (Aug. 11, 2015).

²⁰ Motion to Vacate of the Edison Electric Institute, Docket No. EL13-52-000, *et al.* (Sept. 1, 2015) (EEI Motion).

provided statutory funding for Peak Reliability, *i.e.*, EEI seeks vacatur of Paragraph 27 and Ordering Paragraph D.

14. EEI argues that the orders at issue have “extremely limited, if any” value to the regulated industry or the public because they address the unique circumstances of WECC’s reliability coordinator and interchange authority functions.²¹ Moreover, EEI argues, because the RC Funding Agreement resolves the issue of Peak Reliability’s funding going forward, those orders are not necessary to provide funding for reliability coordinator and interchange authority activities. EEI maintains that the Commission can “vacate its earlier orders without risk of undermining the benefits of the guidance that Commission orders typically provide to the industry and other stakeholders”²²

15. EEI also asserts that vacating the orders will not harm Peak Reliability, because all parties to the RC Funding Agreement have agreed, pursuant to section 12.1 of the RC Funding Agreement, not to seek refunds for amounts paid to Peak Reliability in 2014 and 2015. EEI states that it worked with other stakeholders to obtain this agreement, and that it and its members “have no interest in undermining the continued financial viability of Peak [Reliability].”²³

16. Finally, EEI asserts that granting its motion to vacate the Peak Reliability funding-related orders will resolve the pending appeals related to those orders. EEI states that it will file a voluntary motion to withdraw its appeals if the Commission grants its motion to vacate, and no party requests rehearing of the vacatur. Conversely, if the Commission does not grant its motion, EEI indicates that it “would continue to press its appeal on behalf of the EEI members who were required to pay statutory assessment for the support of Peak [Reliability],”²⁴ and points out the commitment not to seek refunds by signatories to the RC Funding Agreement only applies if the Commission vacates the orders as requested by EEI.²⁵ Because of the conditional nature of the commitment not to seek refunds, EEI claims that granting its motion “would not be inconsistent with the Commission’s policy against vacating orders made moot by the voluntary actions of the parties.”²⁶

²¹ EEI Motion at 6.

²² *Id.* at 7 (citing *New England Power Co.*, 75 FERC ¶ 61,214, at 61,719 (1996)).

²³ *Id.* at 8.

²⁴ *Id.* at 10.

²⁵ *See* EEI Motion, Ex. A (RC Funding Agreement) at § 12.2.

²⁶ *Id.* at 10 (citing *Montaup Electric Co.*, 64 FERC ¶ 61,175, at 62,532 (1993)).

17. NERC and the Western Interconnection Regional Advisory Body (WIRAB) filed substantive responses to EEI's motion to vacate.²⁷

18. NERC argues that EEI's motion to vacate is too broad, and asks that any vacatur granted exclude the Commission's approval of two Peak Reliability governance documents: (1) the NERC-WECC Regional Delegation Agreement (RDA); and (2) the termination agreement between WECC and NPCC. NERC points out that the Commission accepted certain changes to the NERC-WECC RDA to implement the separation of WECC's compliance monitoring and reliability coordinator functions, which changes were accepted as part of the December 6, 2013 Order and the 2014 Funding Order. Similarly, NERC points out that the Termination Agreement between WECC and NPCC continues to impose certain obligations on the contracting parties, also approved as part of the December 6, 2013 Order and the 2014 Funding Order. Accordingly, NERC asks that vacatur of these orders, if granted, should be limited to exclude the Commission's approval of governance or other documents still in effect.

19. WIRAB submitted an advisory pleading to the Commission on September 25, 2015, opposing EEI's motion to vacate. WIRAB observes that the orders for which vacatur is sought do provide value to the public, as they provide important precedent on FPA section 215 funding if Peak Reliability's alternative funding mechanism should fail. WIRAB also argues that EEI has created its own, circular justification for vacatur, by choosing to continue to press its appeal unless the Commission vacates its prior orders on Peak Reliability funding.

D. Motion to Terminate Sub-Delegation Agreement

20. On March 29, 2016, WECC and Peak Reliability filed a joint motion to terminate the RC IA Agreement between WECC and Peak Reliability, thereby terminating the sub-delegation by WECC of the reliability coordinator function to Peak Reliability. WECC and Peak Reliability state that the continuing sub-delegation of reliability coordinator functions has become unnecessary with the implementation of the RC Funding Agreement, and that WECC and Peak Reliability have therefore mutually agreed to terminate the RC IA Agreement.

21. EEI submitted comments in support of the motion to terminate the RC IA Agreement. No comments in opposition to the motion were submitted.

²⁷ Peak Reliability filed a limited response to EEI's motion, taking no position on the request to vacate, but asking that the Commission not act on the motion until January 1, 2016.

II. Commission Determination

22. We grant the unopposed motion to terminate the RC IA Agreement between WECC and Peak Reliability, as WECC's sub-delegation of the reliability coordinator function has become unnecessary given the development of Peak Reliability's alternative funding mechanism.

23. In addition, under the unique circumstances presented, we will grant, in part, EEI's motion to vacate our earlier orders allowing Peak Reliability to rely on FPA section 215 funding for its reliability coordinator and interchange functions. We grant EEI's request to vacate the WECC Bifurcation Order, the December 6, 2013 Order, the 2014 Funding Order, and the 2014 Rehearing Order in their entirety, except that, per NERC's request, we exclude from our vacatur of the December 6, 2013 Order and the 2014 Funding Order our approval of the NERC-WECC RDA and of the Termination Agreement between WECC and NPCC.²⁸ In addition, we grant EEI's request to vacate Paragraph 27 and Ordering Paragraph D of the 2015 Funding Order.

24. Historically, the Commission has not generally been inclined to vacate orders that have become moot due to settlement or other voluntary action on the part of the parties.²⁹ Instead, the Commission has found that Commission orders, even if moot, can serve to provide significant informational benefits to the public by announcing the Commission's intentions for the future.³⁰ However, the Commission has been willing, in certain unique circumstances, to entertain motions to vacate orders that have become moot by virtue of settlement (or otherwise),³¹ and in those cases, has "been guided by an examination of

²⁸ To effectively remove our discussion and findings on FPA section 215 funding for Peak Reliability in those orders, we hereby vacate Paragraph 2 (in part), Paragraphs 38-47, and Ordering Paragraph A of the December 6, 2013 Order; and Paragraphs 16-21 and Ordering Paragraph C of the 2014 Funding Order.

²⁹ See, e.g., *Southern California Edison Co.*, 55 FERC ¶ 61,497 (1991) ("we are disinclined to devote our time and limited resources (as well as the parties' time and resources) to addressing motions to vacate").

³⁰ See, e.g., *Swecker v. Midland Power Coop.*, 108 FERC ¶ 61,268, at P 28 (2004) (citing *Panhandle Eastern Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C.Cir. 1999)).

³¹ See *New England Power Co.*, 75 FERC ¶ 61,214, at 61,719 & n.5 (granting motion to vacate rehearing orders that had become moot due to cancellation of subject transmission tariffs) (citing, *inter alia*, *Northeast Utilities Service Co.*, 59 FERC ¶ 61,089 (1992)).

judicial decisions concerning the equitable discretion of a court or agency to vacate earlier determinations that have become moot.”³²

25. We find vacatur to be appropriate in this case for several reasons. First, with the exception of WIRAB, which is acting in an advisory capacity only, the motion for vacatur is supported by all parties that participated in this proceeding.³³ Second, we believe there is limited precedential value in leaving the Peak Reliability funding-related orders in place, given that the specific questions related to Peak Reliability’s funding appear not only to be unique to the Western Interconnection, but also to be unlikely to recur given the parties’ development of an alternative funding mechanism. Third, the effect of accepting the settlement in combination with the vacatur leaves the parties in the same position as if the prior orders had continued to stand, *i.e.*, Peak Reliability’s funding for 2014 and 2015 will remain undisturbed and not subject to refund.³⁴

26. Finally, we note that in vacating the orders or portions of orders indicated *supra* Paragraph 23, we do not disturb any aspect of our prior orders related to FPA section 215 funding of WECC’s internal reliability coordinator and interchange authority functions, as conducted from 2007 through 2013.

³² *Id.* at 61,719 & n.6 (citing, *inter alia*, *Anderson v. Green*, 115 S.Ct. 1059 (1995)); *see also PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 64 (2007) (“where the Commission has granted such motions [to vacate], it has been in response to situations where orders have become moot by virtue of settlement or conduct otherwise outside the control of the parties moving for vacatur”).

³³ WIRAB refers to the “potential harm” to the financial viability of Peak Reliability (created by EEI’s decision to press its appeal), but does not claim that any party will be directly harmed if the Commission grants EEI’s request for vacatur.

³⁴ *Cf. Southern California Edison Co.*, 106 FERC ¶ 61,206, at P 16 (2004) (granting request to vacate prior order dismissing a petition for declaratory order, as part of a settlement agreement, where the vacatur was supported by all parties and would cause no harm, the orders being vacated addressed issues unique to the proceeding, and vacatur left parties in the same position as if the prior orders dismissing the petition had continued to stand); *see also Metropolitan Dade County, FL v. Entergy Systems Division of Thermo Electron Corp.*, 76 FERC ¶ 61,283, at 62,455-56 (1996) (vacating an earlier Commission order where the vacatur allowed for the consensual resolution of a protracted dispute).

The Commission orders:

(A) The motion to terminate the RC IA Agreement between WECC and Peak Reliability is granted.

(B) EEI's motion to vacate the Commission's prior orders related to FPA section 215 funding for Peak Reliability is granted, with the modifications requested by NERC and as described in the body of this order.

By the Commission. Commissioner Clark is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.