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

Cedar Creek Wind Energy, LLC) Docket No. RC11-1-000
Milford Wind Corridor Phase I, LLC) Docket No. RC11-2-000
)

**REQUEST OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING OF THE
ORDER DENYING APPEALS OF ELECTRIC RELIABILITY ORGANIZATION
REGISTRATION DETERMINATIONS**

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I. INTRODUCTION

Pursuant to Rules 212 and 713¹ of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.713, the North American Electric Reliability Corporation ("NERC") requests clarification or, in the alternative, rehearing of the Commission's June 16, 2011 Order Denying Appeals of the Electric Reliability Organization ("ERO") Registration Determinations ("June 16 Order").²

The June 16 Order denied the appeals of Cedar Creek Wind Energy, LLC ("Cedar Creek") and Milford Wind Corridor Phase I, LLC ("Milford") of their registration as transmission owners ("TO") and transmission operators ("TOP"). The June 16 Order also dictated specific Reliability Standards and requirements that both Cedar Creek and Milford must be required to comply with. Additionally, the June 16 Order directed NERC to file, within 90 days from the date of issuance of the order, a compliance filing including separate lists of Reliability Standards and requirements applicable to Cedar Creek and to Milford.

Cedar Creek and Milford submitted individual appeals to the Commission regarding separate NERC decisions to register them for TO and TOP functions. The Commission addressed both appeals in the June 16 Order given the similarity of issues raised in the two proceedings. NERC addresses Cedar Creek and Milford jointly in this filing as well.

¹ 18 C.F.R. §§ 385.212 and 385.713 (2010).

² *North American Electric Reliability Corporation*, 135 FERC ¶ 61,241 (2011) ("June 16 Order").

II. STATEMENT OF ISSUES FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING

Pursuant to 18 C.F.R. § 385.713, NERC seeks clarification or, in the alternative, rehearing on the several issues in Paragraphs 71-73 and 87-89 in which FERC dictated minimum lists of Reliability Standards and requirements applicable to Cedar Creek and Milford.

Issue for Clarification: The Commission should clarify that the lists of TO and TOP Reliability Standards and associated directives provided in the June 16 Order concerning Cedar Creek and Milford are not intended to prejudge or dictate the outcome for (a) the Reliability Standards development process in NERC Project 2010-07 that NERC initiated to provide clarity to Generator Owners (“GO”) and Generator Operators (“GOP”) regarding their Reliability Standard obligations at the interface with the interconnected grid, or (b) the Reliability Standards and requirements that should apply to Cedar Creek and Milford in advance of the Commission-ordered negotiations.

Issue for Rehearing in the Alternative: If the Commission does not clarify the June 16 Order as requested, then NERC seeks rehearing of the decisions on the lists of TO and TOP Reliability Standards and associated directives concerning Cedar Creek and Milford in the June 16 Order because those decisions impermissibly prejudge issues that are pending in NERC’s standards development process and the Commission-ordered negotiations, in violation of Section 215(d) of the Federal Power Act (“FPA”) and Commission precedent.

III. DISCUSSION

A. Request for Clarification

NERC seeks clarification and, in the alternative, rehearing with respect to Paragraphs 71-73 and 87-89 of the June 16 Order, in which FERC found that, at a minimum, Cedar Creek should be required to comply with the following Reliability Standards:

- PRC-001-1, Requirements R2, R2.2, R4;
- PRC-004-1, Requirement R1;
- TOP-004-2, Requirements R6, R6.1, R6.2, R6.3, R6.4;

- PER-003-1, Requirements R1, R1.1, R1.2;³
- FAC-003-1, Requirements R1, R2;
- TOP-001, Requirement R1 and
- FAC-014-2, Requirement R2.⁴

With respect to Milford, the Commission found that, at a minimum, it should be required to comply with the following Reliability Standards:

- PRC-001-1, Requirements R2, R2.2, R4, R6;
- PRC-004-1, Requirement R1;
- TOP-004-2, Requirements R6, R6.1, R6.2, R6.3, R6.4;
- PER-003-1, Requirements R1, R1.1, R1.2;
- FAC-003-1, Requirements R1, R2;
- TOP-001, Requirement R1 and
- FAC-014-2, Requirement R2.⁵

NERC and the Western Electricity Coordinating Council (“WECC”) have registered entities such as Cedar Creek and Milford as Transmission Owners and Transmission Operators in order to close the reliability gap that exists because certain requirements that are necessary for reliable operation of the bulk power system, but those requirements do not apply to Generator Owners and Generator Operators. Those requirements relate to the lines between the generating plants and the rest of the bulk power system. Because those lines also meet the definition of transmission as NERC has applied it under section 215, registration of the Generator Owners and Generator Operators was one way that NERC could close the reliability gap.

However, as the Commission noted in the June 16 Order, NERC has initiated Reliability Standards Project 2010-07 (Generator Requirements at the Transmission Interface) “to generically address matters involving reliability obligations at the interface of the transmission

³ The June 16 Order references PER-003-1, which appears to be an error. NERC submitted PER-003-1 for FERC approval on April 29, 2011. NERC’s petition has not yet been acted on by the Commission. Thus, PER-003-0 is still in effect.

⁴ June 16 Order at P 71.

⁵ June 16 Order at P 87.

grid.”⁶ The stated purpose of Project 2010-07 is to modify and develop requirements that “add significant clarity to Generator Owners and Generator Operators regarding their reliability standard obligations at the interface with the interconnected grid.”⁷ Modifying the Reliability Standards as they apply to Generator Owners and Generator Operators such that the relevant requirements related to the lines between the generators and the rest of the bulk power system do apply to Generator Owners and Generator Operators is another way to address the reliability gap. It is also likely to be a more effective and efficient way of addressing that reliability gap.

On November 16, 2009, a final report of the *Ad Hoc Group for Generator Requirements at the Transmission Interface* was released (“GO/TO Report”).⁸ Among other things, the GO/TO Report recommended changes to Reliability Standards and “modifications to NERC’s Rules of Procedure, Registry Criteria, and other documents to reflect that a generation operator should not be registered as a transmission operator on the basis of the generator interconnection facility.”⁹

Following the release of the GO/TO Report, the Commission issued its final rule regarding the definition of bulk electric system (also referred to herein as “BES”) where the Commission directly responded to certain commenters regarding generation and radial transmission facility issues, including requests to formally adopt the GO/TO Report.¹⁰ The BES

⁶ June 16 Order at FN 58.

⁷ NERC Project 2010-07, Generator Requirements at the Transmission Interface, available at: http://www.nerc.com/filez/standards/Project2010-07_GOTO_Project.html.

⁸ See *Final Report from the Ad Hoc Group for Generator Requirements at the Transmission Interface* and related materials, available at: http://www.nerc.com/filez/standards/Project2010-07_GOTO_Project.html (“GO/TO Report”).

⁹ June 16 Order at FN 14.

¹⁰ *Revision to Electric Reliability Organization Definition of Bulk Electric System*, 133 FERC ¶ 61,150 at P 55 (November 18, 2010) (“BES Final Rule”).

Final Rule stated that the NERC Board of Trustees has not approved any action on the report and that these issues should be addressed through the standards development process.¹¹

The NERC Board of Trustees will consider the GO/TO Report and Project 2010-07 once the Reliability Standards development process is concluded. The standards drafting team for Project 2010-07 has already proposed changes to Reliability Standards containing GO/GOP and TO/TOP requirements. Specifically, the standards drafting team has proposed modifications to Reliability Standards FAC-001 and FAC-003, so that both standards will be applicable to Generator Owners.¹² Currently, Generator Owners must be registered as Transmission Owners for FAC-001 and FAC-003 to apply to their facilities.

NERC seeks clarification that the language regarding the Reliability Standards that Cedar Creek and Milford must comply with is not intended to prejudge the outcome of the Project 2010-07 standards development effort. At a minimum, the language in the June 16 Order should be considered to be the equivalent of directives that the Commission issues under section 215(d)(5) of the FPA:

The Commission agrees with NRECA to the extent that we do not wish that a direction for modification be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process. However, as stated in Order No. 693, in identifying a specific matter to be addressed in a modification to a Reliability Standard, it is important that the Commission provide sufficient guidance so that the ERO has an understanding of the Commission's concerns and an appropriate, but not necessarily exclusive, outcome to address those concerns. Without such direction and guidance, the ERO might not know how to respond adequately to a Commission proposal to modify a Reliability Standard. Thus, in some instances, while we provided specific details regarding the Commission's expectations, we intended by doing so to provide useful guidance to assist in the Reliability Standards development process, not to impede it.

¹¹ *Id.*

¹² NERC Standards Announcement, Project 2010-07 Generator Requirements at the Transmission Interface Formal Comment Period Open June 17 – July 17, 2011, available at: http://www.nerc.com/docs/standards/sar/Project_2010-07_Standards_Announcement_061711.pdf.

* * * In many instances, the Commission provided guidance to the ERO and stated that it could develop an alternative to our direction, so long as the alternative is as effective and efficient as the Commission's proposal. *
* *(Order No. 693-A, para. 40 and 41 (footnotes omitted).)

Relying on the standards development process to clarify the requirements that are appropriately applicable to Generator Owners and Generator Operators has another salutary effect. It will avoid protracted registration disputes when GOs and GOPs are registered as TOs and TOPs in order that a subset of the requirements applicable to TOs and TOPs be made applicable to GOs and GOPs. Under the approach addressed in the June 16 Order, resolving the registration dispute does not end the matter. The Commission here, as it did in *New Harquahala*, has sent NERC, WECC and the Registered Entities back to the bargaining table to negotiate an agreement on what standards are applicable in the circumstances. And if that fails to resolve the matter, the Commission invites further proceedings where it will resolve the dispute. That is not an efficient way to move forward on these issues. Neither NERC, the Regional Entities, nor the Registered Entities have the resources for case-by-case registration and case-by-case negotiation of applicable standards, with intermediate appeals to the Commission.

Consistent with FERC precedent, NERC also requests clarification that the identification of requirements of Reliability Standards in the June 16 Order was for illustrative purposes, and was not intended to mandate compliance with those specific requirements for Cedar Creek and Milford. Specifically, in *New Harquahala*, the Commission denied an appeal of TO and TOP registration, but only provided examples of applicable TO and TOP Reliability Standards to be considered in negotiations between NERC and Harquahala. The Commission reasoned that, "if Harquahala is not required to comply with *at least some* of the Reliability Standards applicable

to a transmission owner and operator, there will be reliability gaps...”.¹³ The Commission then went on to highlight specific Reliability Standards and requirements.¹⁴

Harquahala sought clarification on the list of standards highlighted by the Commission, arguing that it would be arbitrary and capricious to mandate compliance with such standards prior to the conclusion of the negotiation process and without considering arguments raised by Harquahala on appeal. The Commission granted Harquahala’s request for clarification. A similar result is appropriate here.

In short, the Commission should clarify that the minimum lists of Reliability Standards included in the June 16 Order are not intended to prejudge either the outcome of the Reliability Standards development process for Project 2010-07, or the Reliability Standards that should apply to Cedar Creek and Milford in advance of the Commission-ordered negotiations.

B. Alternative Request for Rehearing

If the Commission does not grant the requested clarification, then NERC requests rehearing of those portions of the June 16 Order that dictate what Reliability Standards must, at a minimum, be applicable to Cedar Creek and Milford. Section 215 of the FPA requires the ERO to develop Reliability Standards under rules that ensure “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.”¹⁵ Section 215(d)(2) also requires the Commission to give due weight to the technical expertise of the ERO with respect to the content of a standard.¹⁶ Section 215(d)(5) provides that the Commission may order the ERO to submit a proposed Reliability Standard or a modification to a Reliability Standard that

¹³ See *New Harquahala Generating Company, LLC*, 123 FERC ¶ 61,173 at P 52 (May 16, 2008) (“New Harquahala”) *order on reh’g*, 123 FERC ¶ 61,311 (June 27, 2008)(*emphasis added*).

¹⁴ *Id.* at P 52.

¹⁵ 16 U.S.C. § 824o(c)(2)(D).

¹⁶ 16 U.S.C. § 824o(d)(2).

addresses a specific matter if the Commission considers such a new or modified Reliability Standard appropriate to carry out Section 215.¹⁷ There are limits to the Commission's authority, however. The Commission does not have authority to dictate the outcome of the Reliability Standard development process. Rather, it may either approve a Reliability Standard (or modifications thereto) or remand it to the standards development process to consider and address any issues.¹⁸

In Order No. 693, the Commission acknowledged that it would defer to the "technical expertise" of the ERO with respect to the content of a Reliability Standard.¹⁹ The Commission stated:

Pursuant to Section 215(d)(2) of the FPA and § 39.5(c) of the Commission's regulations, the Commission will give due weight to the technical expertise of the ERO with respect to the content of a Reliability Standard or to a Regional Entity organized on an Interconnection-wide basis with respect to a proposed Reliability Standard or a proposed modification to a Reliability Standard to be applicable within that Interconnection.

Additionally, the Commission noted in Order No. 693 that NERC could respond to a Commission directive with an alternative approach that produces an equally effective alternative to the Commission's proposal. The Commission also explained that, through the use of directives, it provides guidance but does not dictate an outcome; rather, it will consider an equivalent alternative approach provided that the ERO demonstrates that the alternative will address the Commission's underlying concern or goal as efficiently and effectively as the Commission's proposal, example or directive.

¹⁷ 16 U.S.C. § 824o(d)(5).

¹⁸ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (courts and agencies are to "give effect to the unambiguously expressed intent of Congress.").

¹⁹ *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 at P 8 (2007) ("Order No. 693"), *reh'g denied*, 120 FERC ¶ 61,053 (2007) ("Order No. 693-A").

Similarly, in a recent order on rehearing, the Commission confirmed that its directives are not intended to usurp or supplant the Reliability Standards development process:

Nevertheless, to clarify our intention, we state that the Commission is not changing course from Order Nos. 672 and 693 and is not denying the ERO the opportunity to develop Reliability Standards using its technical expertise. We stand by Order Nos. 672 and 672-A, where we explained that the Commission does not intend to prescribe the text or substance of Reliability Standards and confirmed that the ERO alone can change a Standard. **We also stand by our comprehensive explanation in Order No. 693 of the relationship between Commission directives under section 215(d)(5) of the FPA and the ERO's statutory right to develop new and modified Reliability Standards using its technical expertise.** As we explained in Order No. 693, and confirm today, when the Commission issues a directive pursuant to 215(d)(5) of the FPA, the ERO has the flexibility to respond with an alternative that is an equally effective and efficient means of addressing the Commission's underlying goal or concern.²⁰

While the June 16 Order does not directly dictate the content of a specific Reliability Standard, it could be interpreted as dictating the outcome of the on-going efforts of the Project 2010-07 drafting team to provide clarity to Generator Owners and Generator Operators regarding their Reliability Standard obligations at the interface with the interconnected grid. The Commission's order therefore accomplishes indirectly that which it is prohibited from doing directly, in contravention of well-established judicial precedent.²¹

Accordingly, NERC requests that the Commission grant this alternative request for rehearing to allow the Commission-ordered negotiation process for determining the lists of TO and TOP Reliability Standards and requirements applicable to Cedar Creek and Milford to proceed, and to protect the integrity of the Reliability Standards development process as a whole.

²⁰ *Order Denying Rehearing, Denying Clarification, Denying Reconsideration, and Denying Request for a Stay*, 132 FERC ¶ 61,218 a P 30 (September 16, 2010) (*emphasis added*).

²¹ Courts have consistently held that the Commission cannot do indirectly that which it cannot do directly. *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978).

IV. CONCLUSION

For the reasons set forth in this filing, NERC requests that the Commission clarify or, in the alternative, grant rehearing that the minimum lists of TO and TOP Reliability Standards and associated directives provided in the June 16 Order concerning Cedar Creek and Milford are not intended to usurp or supplant, nor are they intended to effectuate a particular outcome for, the Reliability Standards development process for NERC Project 2010-07.

Respectfully submitted,

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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, D.C. this 18th day of July, 2011.

/s/ Willie L. Phillips

Willie L. Phillips

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